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NO. 84-

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

MORRIS L. THIGPEN, COMMISSIONER, ET AL.,
Respondents-Appellants
Cross-Appellees,

vs.

LARRY JONES,
Petitioner-Appellee
Cross-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. The writ should be granted to determine whether the United States Court of Appeals for the Fifth Circuit has misconstrued this Court's ruling in Enmund.

2. Alternatively, the writ should be granted to determine whether under the circumstances the Court of Appeals erred in concluding that Enmund should be applied retroactively.

3. The Court should granted the writ to determine whether the Court of Appeals erred in failing to find that respondent's claims of ineffective assistance of counsel and failure to give a lesser included offense were procedurally barred. *

* This question is included, as explained poste, simply for preservation purposes in order to avoid the problem encountered in Thigpen v. Roberts, 468 U.S. ____, 104 S.Ct. 2916, 82 L.Ed.2d 23 (1984).

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I. PREFACE

Petitioners pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit, viz., the panel decision dated September 17, 1984, and the subsequent denial of panel rehearing and suggestion of rehearing en banc on November 1, 1984.

II. OPINIONS BELOW

State Court: Respondent's original conviction and sentence of death were reversed pursuant to Jackson v. State, 337 So.2d 1242 (Miss. 1976), in an unpublished opinion reported as Jones v. State, 342 So.2d 735 (Miss. 1976). The opinion of the Mississippi Supreme Court upholding the conviction and sentence on remand is reported as Jones v. State, 381 So.2d 983 (Miss. 1980). Jones' application for leave to file a petition for writ of error coram

nobis was denied without opinion and the order denying the same was not reported.

United States Supreme Court: This Court's denial of respondent's petition for writ of certiorari subsequent to his direct appeal is reported as Jones v. Mississippi, 449 U.S. 1003, 101 S.Ct. 543, 66 L.Ed.2d 300 (1980).

District Court: The United States District Court opinion denying relief as to the guilt phase and granting relief as to the sentence phase is reported as Jones v. Thigpen, 555 F.Supp. 870 (S.D. Miss. 1983).

Court of Appeals: The panel decision of the Court of Appeals is reported as Jones v. Thigpen, 741 F.2d 805 (5th Cir. 1984). The per curiam orders denying panel rehearing and suggestion of rehearing en banc are reported as Jones v. Thigpen, 747 F.2d 1465 (5th Cir. 1984).

III. JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered September 17, 1984. A timely petition for panel rehearing and a suggestion for rehearing en banc was denied November 1, 1984. The judgment of the Court of Appeals was issued, as and for the mandate, on November 13, 1984. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, viz.,

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . .";

the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution as applied to the States through the Due Process Clause of the Fourteenth Amendment; 28 U.S.C. § 2254(a), viz.,

> ". . . a district court shall entertain an application for a writ of habeas corpus in behalf of a person
>
> in custody pursuant to a judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States".

V. STATEMENT OF THE CASE

A. The Substantive Facts

The case against respondent was circumstantial. Taken in a light favorable to the verdict and engaging in all reasonable inferences, the proof showed that on December 2, 1974, Arthur Weinberger, a 76 year old white male, was found bludgeoned to death in his place of business, Art's Levi Store, in

downtown Biloxi, Mississippi. From the testimony, we may adduce that the robbery occurred between the hours of eleven and twelve o'clock noon that being the approximate period Mrs. Lerline LeBlanc, Weinberger's employee, was absent from the store. Preston Sullivan testified that he found Weinberger injured in the store between eleven thirty and twelve. According to the testimony of J. D. Reddix, he was persuaded by respondent and his brother, drive them to downtown Biloxi on the day of the crime before lunch. They parked in a parking lot not far from Weinberger's place of business and both Jones and Willie Reddix exited the car. J. D. Reddix was instructed to wait. Lula Mae Bell, the Reddix's aunt, testified that she saw the two get out of J.D.'s car and later saw Willie running east with a dark coat draped over his shoulders. She stated that she observed respondent wearing combat boots. At

approximately a quarter of twelve Ray Real testified that he saw a black male within twenty or thirty feet of Weinberger's store carrying a blue footlocker or trunk. Minutes later he saw the same man walking in a southeasterly direction in an alley heading toward the parking lot where J. D.'s car was parked.

A witness who worked in the area saw three men enter the parking lot in a grey Cadillac identified at trial as J. D.'s car. He stated that he saw two men exit the car and walk toward Howard Avenue, the street on which Weinberger's place of business was located. One returned from the direction of Weinberger's store with a leather coat hanging on his shoulder, and the other returned from a slightly different direction carrying a blue footlocker. Willie Reddix was identified as having the coat, and the footlocker introduced

at trial was identified as the one carried by the other person.

Annie Reddix, the mother of Willie and J.D., testified that Jones put the blue footlocker in a closet in her house on the afternoon of the crime. This was later retrieved by the police. The leather coat was later seized from J. D.

Mrs. LeBlanc testified that the coat was part of a display. The trunk was found to contain numerous items taken from the Store. No sales had been registered during Mrs. LeBlanc's absence, and all of the money in the store was missing. J. D. testified that Jones gave him a pair of pants from the trunk the afternoon of the crime. He also found a shirt in a closet at his mother's which he took. Mrs. LeBlanc positively identified the trunk and its contents as well as the pants and shirt possessed by J. D.

The testimony also linked respondent to the crime by his dress that day. J. D., Lula Mae Bell, and Annie Reddix each testified that respondent wore a pair of army or combat boots on the day of the crime. Likewise, Orvel Magee testified that the man he saw carrying the trunk wore combat boots. Boots matching this description were found in a closet along with the trunk. Serological examination determined that there was human blood stains on the top of one of the boots. The presence of blood on the top of the boot was consistent with the type of blunt trauma inflicted on the victim.

B. Procedural History

Respondent, Willie Reddix and John Durengo Reddix [1] were jointly indicted in the Circuit

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[1] The State subsequently took a nolle prosequi on the charge against J. D., and he was reindicted and convicted as an accessory after the fact.

Court of the Second Judicial District of Harrison County, Mississippi, on or about February 7, 1975, in cause number 968 for the crime of capital murder.

On or about March 19, 1975, respondent was found guilty and sentenced to death. A timely appeal was perfected and the case was reversed with instructions to follow the procedures outlined in Jackson v. State, 337 So.2d 1242 (1976). Jones v. State, 342 So.2d 735 (1977).

On remand, petitioner was brought to trial during the December, 1977 term of court where on December 14, 1977, he was found guilty of the crime of capital murder and on the following day, December 15, 1977, he was sentenced to death.

Respondent's Motion for New Trial was overruled, and an appeal was perfected to the Mississippi Supreme Court. [MCA § 99-19-105 (Cum. Supp. 1978)]. On January 30, 1980, the

Court affirmed the conviction and the sentence, and on April 2, 1980, rehearing was denied. Jones v. State, 381 So.2d 983 (Miss. 1980). In addressing the contention that "the record does not expressly show that this appellant was actively engaged in an assault on the victim in the course of the robbery set out by all the evidence in the record," the Mississippi Supreme Court held:

> We agree the record does not conclusively establish which of the two co-felons, Willie Reddix or Larry Jones, the appellant, actually wielded the blows causing Weinberger's death. However, doubt concerning the precise role of the appellant in the homicide does not upset the jury's verdict. The indictment alleges that Larry Jones, together with his co-indictees Willie Reddix and J. D. Reddix, participated in an armed robbery which resulted in the death of Arthur Weinberger, a human being. The statutory subsection proscribing appellant's conduct, Mississippi Code Annotated section 97-3-19(2)(e) (1972), appears in the indictment. It designates as capital murder a killing "done with or without any design to effect death, by any person

engaged in the commission of the crime of . . . robbery . . . ."

This language renders the factual question of which of two co-felons acted as the efficient cause of the death unnecessary to the verdict in the guilt-determining phase. It is enough that the evidence shows the willing participation of the accused in a robbery in furtherance of which a death resulted. See Price v. State, 362 So.2d 204 (Miss. 1978); McNeer v. State, 228 Miss. 308, 87 So.2d 568 (1956); Carrol v. State, 183 Miss. 1, 183 So. 703 (1938); Woodward v. State, 166 Miss. 596, 143 So. 859 (1932); Fisher v. State, 150 Miss. 206, 116 So. 746 (1928); cf. Miss. Code Ann. § 97-1-3 (1972).

As we have said, the evidence sufficiently demonstrates such a willing participation by the appellant. He does not challenge the indictment, nor suggest the legislature lacks the power to expose him to guilt of capital murder in the absence of proof that he had a specific intention to kill. We conclude that the verdict in the guilt-determining phase is within the law and the weight of the evidence.

Jones v. State, supra, at 990.

In commenting upon the same subject in the Court's proportionality review, Justice Walker speaking for the majority held:

> The proof in this case sufficiently demonstrates that the defendant was an active and willing participant in a robbery in furtherance of which a death resulted. Although there was no direct testimony that Jones struck the fatal blow, the blood on his boots, coupled with the testimony of several witnesses who placed Jones near the scene of the crime, is strong evidence that he was at least present when the fatal beating took place. The doubt concerning Jones' precise role in the homicide does not upset the jury's sentence of death under these circumstances.
>
> Compared to the other capital cases in which we have affirmed the death sentence, this killing was equally as wanton, cruel and senseless as the others. The defendant was actively engaged in a robbery during the course of which the victim, a merchant over seventy years of age, was brutally murdered by blows to the hear which crushed his skull.

Id., at 996.

Certiorari was denied by this Court on November 17, 1980, Jones v. Mississippi, 449 U.S. 1003, 101 S.Ct. 543, 66 L.Ed.2d 300 (1980), and on March 3, 1981, respondent filed an application for leave to file a petition for writ of error coram nobis with the Mississippi Supreme Court. [MCA § 99-35-145 (repealed April 17, 1984, Ch. 378, Miss. Gen. Laws of 1984)]. On April 1, 1981, the Court dismissed the application without opinion, and respondents filed the instant petition for writ of habeas corpus in the United State District Court for the Southern District of Mississippi. On June 2, 1981, the petitioners were ordered to show cause, and on June 24, 1981, the issues were joined.

On February 4, 1982, a status conference was conducted before the Honorable Dan M. Russell, Senior United States District Judge, whereupon respondent was granted twenty (20)

days within which to file an amended petition with petitioners to answer within ten (10) days thereafter. A briefing schedule was established, and a tentative hearing date set.

On February 26, 1982, respondent filed his amended petition and for the first time raised the question of denial of effective assistance of counsel. In their answer and return the petitioners plead that the effective assistance claim as well as others were procedurally barred.

On August 16, 1982, a hearing was held. No testimony was taken on the effective assistance issue, however, since the petitioner was not present. Oral argument was heard on the remaining issues. On October 7, 1982, the hearing was reconvened with Dr. Gilbert S. MacVaugh, Ph.D. being called to testify on behalf of the respondent and Dr. Glenn Anderson, MD, Dr. Will Johnson, Ph.D., and Hugh McLaurin,

Jr., all employees of the Mississippi State Hospital at Whitfield, on behalf of the State.

On January 28, 1983, the District Court filed a memorandum opinion denying the writ in part as to the guilt phase and granting it in part as to the sentencing phase on two grounds; i.e., [1] that no finding as required by Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), had been made and [2] that respondent had been denied effective assistance of counsel. In granting relief on the Enmund issue, the Court rejected respondent's claim of insufficiency of the evidence.

An appeal was thereafter taken by the petitioners, here, and respondent filed a cross-appeal. Several issues were assigned as error including the failure of the District Court to find the ineffective assistance and lesser included instructions claims to be procedurally barred. The Court of Appeals for the

Fifth Circuit affirmed the District Court in part, reversed in part, and remanded with instructions. In their opinion the panel found:

> 1. That the proscription of Wainwright v. Sykes, 433 U.S. 72 (1977), was not jurisdictional and that they could address the merits of the lesser included offense claim.
>
> 2. That there was no merit to the lesser included offense claim.
>
> 3. That the District Court was correct in its ruling that there was no talismatic jury finding as required by Enmund.
>
> 4. That the District Court erred in denying the sufficiency of the evidence claim as such related to Enmund.
>
> 5. That because it was affirming the grant of relief as to the sentencing phase, the Court did not have to address the claim of denial of effective assistance of counsel.

See Jones v. Thigpen, 741 F.2d 805 (5th Cir. 1984). The respondents' petition for panel rehearing and suggestion for rehearing en banc

were denied without opinion. Jones v. Thigpen, 747 F.2d 1465 (5th Cir. 1984).

VI. REASONS FOR GRANTING THE WRIT

1. The Writ Should Be Granted To Determine Whether The United States Court Of Appeals For The Fifth Circuit Has Misconstrued This Court's Ruling In Enmund

Without question, the issue decided in Enmund concerned the disproportionality of a sentence of death where the Florida Supreme Court determined that the record did "not warrant a finding that Enmund had any intention of participating in or facilitating a murder." The issue, therefore, presented to this Court is directed to a determination of whether Enmund requires, as interpreted by the Fifth Circuit, a talismatic finding by the sentencing authority or may such, as interpreted by the District Court and the predominant majority of

the States, concern itself with a question of appellate proportionality review.

Before delving into what we consider to be the proper construction of Enmund, let us first examine the well-spring from whence such emanates.

A review of the opinion of the Florida Supreme Court in Enmund v. State, 399 So.2d 1362 (Fla. 1981), supplies some insight into the situation. The thesis of Enmund's argument was summarized thusly:

> The appellant contends that there is no evidence that he committed premeditated murder on either of the victims, or that he was present aiding and abetting the robbery when they were shot. He argues that the very most the jury could have concluded from the evidence is that he was in the car seen out by the highway when the robbery and murders were committed. Therefore, he contends, the most serious crime of which he could be convicted with regard to

> each of the homicides is murder in the second degree, based on the felony murder rule.
>
> Id., at 1368.

The controversy, therefore, raged over whether Enmund could be convicted of first degree felony murder or second degree felony murder. In reaching its ultimate conclusion the Court citing Dixon v. State, 283 So.2d 1 (Fla. 1973), thoroughly discussed the Florida Law of Parties noting in particular that there is a distinction between principles in the first and second degree and accessories before the fact. Likewise, the Court determined that death could be imposed if Enmund was a principle in the first degree to either the homicide or the robbery. In particular the Court noted:

> We conclude, therefore, that if the appellant's conduct that the jury could have found from the evidence made him as accessory before the fact to the underlying felony of robbery, then his contention that the highest offense for which he may

be convicted is second-degree murder must be accepted. If, on the other hand, the jury could have concluded from the evidence that the appellant was a principal of the first or second degree in the crime of robbery, then his contention is without merit and we must hold that the evidence was sufficient for a verdict of guilty of murder in the first degree. To determine the issue as thus framed, it is necessary, as Dixon suggested, to "refer to the rich heritage of case law on the distinctions between principals in the first or second degree and accessories before the fact." State v. Dixon, 283 So.2d at 11.

All persons participating in a crime are principals of the first or second degree. The actual perpetrator is a principal of the first degree. A person who does not commit the crime with his own hands but is present, aiding and abetting the actual perpetrator, is a principal of the second degree. They are both equally guilty of the crime being committed. Lake v. State, 100 Fla. 373, 129 So. 827 (1930). "An accessory before the fact is one who, though absent at the time of the commission of an offense, does nevertheless procure, counsel, command, or abet another to commit

such offense." Kauz v. State, 98 Fla. 687, 124 So. 177, 178 (1929). See generally Henderson v. State, 70 So.2d 358 (Fla. 1954); Albritton v. State, 32 Fla. 358, 13 So. 955 (1893).

Id., at 1369.

While acknowledging that the Legislature purportedly repealed the three distinctions by enactment of Section 776.011, Florida Statutes (1973), it had incorporated such in certain amendments to the murder statutes enacted in 1972. Ch. 72-724, 1972 Gen. Law Fla. Consequently, the Court found that the previous body of the Law of Parties was relevant to their determination. The Court then went on to hold:

> In a prosecution for murder in the first degree, if the accused was present aiding and abetting the commission or attempt of one of the violent felonies listed in the first-degree murder statute, he is equally guilty, with the actual perpetrator of the underlying felony, of first-degree murder. E.g. Pope v. State, 84 Fla. 428, 94 So. 865 (1922). Furthermore, the presence of the aider and abettor need not have been

actual, but it is sufficient if he was constructively present, provided the aider, pursuant to a previous understanding, is sufficiently near and so situated as to abet or encourage, or to render assistance to, the actual perpetrator in committing the felonious act or in escaping after its commission. Id., 84 Fla. at 446, 94 So. at 871.

Id., at 1370.

Hence, we find the comments of this Court to the effect that

As recounted above, the Florida Supreme Court held that the record supported no more than the inference that Enmund was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape. This was enough under Florida law to make Enmund a constructive aider and abettor and hence a principal in first-degree murder upon whom the death penalty could be imposed. It was thus irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or

> might be used if necessary to effectuate the robbery or a safe escape. We have concluded that imposition of the death penalty in these circumstances is inconsistent with the Eighth and Fourteenth Amendments.
>
> 73 L.Ed.2d at 1145-46.

From this point the Court went on to elaborate on the proposition that it was a violation of the Eighth and Fourteenth Amendments to impose death upon a "defendant [who] somehow participated in a robbery in the course of which a murder was committed." 73 L.Ed.2d at 1148. To this extent, the Court in reviewing all death sentences imposed as of October 1, 1981, for which sufficient data was available, held:

> That juries have rejected the death penalty in cases such as this one where the defendant did not commit the homicide, <u>was not present when the killing took place</u> and did not participate in a plot or scheme to murder is also shown by petitioner's survey of the Nation's death-row population. As of October 1,

> 1981, there were 796 inmates under sentences of death for homicide. Of the 739 for whom sufficient data are available, only 41 did not participate in the fatal assault on the victim. Of the 40 among the 41 for whom sufficient information was available, only 16 were not physically present when the fatal assault was committed. These 16 prisoners included only 3, including petitioner, who were sentenced to die absent a finding that they hired or solicited someone else to kill the victim or participated in a scheme designed to kill the victim. The figures for Florida are similar. [emphasis added]
>
> 73 L.Ed.2d at 1150.

The foregoing comments, therefore, raise several serious questions concerning the propriety of the Fifth Circuit's ruling in both this case and those upon which it is founded. Specifically, did this Court condemn the imposition of death where one was actually physically present and aiding and abetting in the homicide or did the Court intend to condemn only those death sentences where the defendant was at most an accessory to the attendant fel-

ony and was actually elsewhere when the homicide was committed? We suggest that the Court intended the latter course of action.

Shortly after the decision in Enmund was rendered the Florida Supreme Court had the opportunity to address the question of its applicability to Florida law. In particular, the Court addressed the question in terms of Law of Parties and the degree of the defendants participation, not in the attendant felony, but the degree of his participation in the actual homicide:

> We have most recently dealt with this matter in the case of Enmund v. State, 399 So.2d 1362 (Fla. 1981), rev'd on other grounds, ____ U.S. ____, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982).
>
> > We conclude, therefore, that if the appellant's conduct that the jury could have found from the evidence made him an accessory before the fact to the underlying felony of robbery, then his conten-

> tion that the highest offense for which he may be convicted is second-degree murder must be accepted. If, on the other hand, the jury could have concluded from the evidence that the appellant was a principal of the first or second degree in the crime of robbery, then his contention is without merit and we must hold that the evidence was sufficient for a verdict of guilty of murder in the first degree.

399 So.2d at 1369. All persons participating in a crime are principals of the first or second degree. The actual perpetrator is a principal of the first degree. A person who does not commit the crime with his own hands but is present, aiding and abetting the actual perpetrator, is a principal of the second degree. Lake v. State, 100 Fla. 373, 129 So. 827 (1930). From this it is evident that the presence of a defendant at the scene of a crime is required for a verdict of guilty of first-degree murder under the felony-murder statute. It is also evident that a verdict of guilty for second-degree felony-murder does not require the defendant's presence.

State v. Lowery, 419 So.2d 621, 623 (Fla. 1982)

From a review of the pertinent case law we find that all of the states that have addressed this question have arrived at a similar conclusion: Enmund does not require that a sentence of death should be vacated where the proof establishes that the defendant was present and actively aided and abetted in the commission of the homicide. See: James v. State, 453 So.2d 786 (Fla. 1984); State v. Willie, 436 So.2d 553 (La. 1983); Leatherwood v. State, 435 So.2d 645 (Miss. 1983); Smith v. State, 424 So.2d 725 (Fla. 1982); State v. Aguiar, 418 So.2d 245 (Fla. 1982); People v. Garcia, 454 N.E.2d 274 (Ill. 1983); Jones v. Francis, 252 Ga. 60, 312 S.E.2d 300 (1984); State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983); Williams v. State, 250 Ga. 553, 300 S.E.2d 301 (1983); State v. Yates, 310 S.E.2d 805 (S.C. 1982); Johnson v. Zant, 249 Ga. 812, 295 S.E.2d 63 (1982); Buttrum v. State, 249 Ga. 652, 293 S.E.2d 334

(1982); Copeland v. State, 457 So.2d 1012 (Fla. 1984); Allen v. State, 321 S.E.2d 710 (Ga. 1984); State v. McKay, 680 S.W.2d 447 (Tenn. 1984); Selvage v. State, 680 S.W.2d 17 (Tex. Crim. App. 1984); Kelly v. State, 669 S.W.2d 720 (Tex. Crim. App. 1984); State v. Tison, 690 P.2d 755 (Ariz. 1984).

Similarly, we note that the Eleventh Circuit has taken a similar position. In Stanley v. Zant, 697 F.2d 955, 973 (11th Cir. 1983), the Court rejected Stanley's Enmund claim holding:

> Stanley's level of personal culpability is greater than Enmund's by at least an order of magnitude. It was Stanley, himself, who was overheard long before the murder to say that after he and Thomas robbed the victim they would have to "get rid of him." His role was aptly described by the Supreme Court of Georgia as follows:
>
> > [T]here was evidence showing that he was an active participant in the crimes: enticing the victim to the

> place of the robbery, handling the pistol, guarding the victim while Thomas moved the car, digging the victim's grave, and burying the victim while he was still alive and pleading for his life.

Stanley v. State, 241 S.E.2d at 180.

> From our examination of the record we agree with the district court that "a trier of the fact could conclude beyond a reasonable doubt that the Defendant had a clear intention to kidnap, rob and murder the victim."

Perhaps the greatest illustration of this proposition can be found in the cases involving Freddie Lee Hall. On direct appeal to the Florida Supreme Court, Hall argued that his sentence of death was disproportionate. The Florida Supreme Court held:

> These facts support the jury's conclusion that, even if Hall did not pull the trigger, he was a principal to the crime of murder. Section 777.011, Florida Statutes (1977), states that

> [w]hoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

An aider and abettor is responsible for all acts committed by his accomplice in furtherance of the criminal scheme. Foxworth v. State, 267 So.2d 647 (Fla. 1972), cert. denied, 411 U.S. 987, 93 S.Ct. 2276, 36 L.Ed.2d 965 (1973); Pope v. State, 84 Fla. 428, 94 So. 865 (1922). The evidence in this case shows that either Hall or Ruffin killed Mrs. Hurst. It also demonstrates that the other was an aider and abettor. There is sufficient evidence to sustain Hall's conviction.

Hall v. State, 403 So.2d 1321, 1323 (Fla. 1981).

On petition for post-conviction relief the question was raised once again in the context

of Enmund. In rejecting his claim, the Florida court again held:

> Citing Enmund v. Florida, _____ U.S. _____, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), Hall claims that the death penalty cannot be imposed because he did not actually and intentionally kill the victim. In Enmund the Supreme Court held that Florida's death penalty statute cannot be applied to one who did not kill, attempt to kill, intend to kill, or intend that lethal force be used. We agree with the trial court that Enmund is distinguishable from the instant case. Hall provided the weapon used to kill Mrs. Hurst and was present at her death. Additionally, Enmund was an aider and abettor only to the underlying felony. Hall, on the other hand, was an aider and abettor to the homicide as well as the underlying felony. There is no doubt in the Court's mind that Hall intended Mrs. Hurst's death.
>
> Hall v. State, 420 So.2d 872, 874 (Fla. 1982).

The case thereupon proceeded to the United States District Court for the Middle District of Florida on petition for writ of habeas cor-

pus. The Honorable Susan H. Black, District Judge, relying on the rulings of the Florida Supreme Court held:

> At trial, the state presented the case to the jury on the theory that Hall and Ruffin did everything together. They planned the robbery together and drove together to the Pantry Pride parking lot to obtain a car. Hall drove the Hurst car to the wooded area while Ruffin followed in his own car. The two were together at the site of Mrs. Hurst's assault and death, at the convenience store where their actions drew suspicions, and when they fled in the stolen car.
>
> This evidence is legally sufficient to withstand attack under Section 2254 if "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).
>
> In order for Hall to be found guilty of first degree murder under Florida law, the state must prove that he either pulled the trigger with a "premeditated design to effect the death of the person kil-

led," Fla.Stat. § 782.04(1)(a) (1973) or, that he was a principal to the crime of first degree murder even if he did not physically pull the trigger. Fla.Stat. § 777.011 (1977) states:

> [w]hoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

An aider and abettor is responsible for all acts committed by his accomplice in furtherance of the criminal scheme. Foxworth v. State, 267 So.2d 647 (Fla. 1972), cert. denied, 411 U.S. 987, 93 S.Ct. 2276, 36 L.Ed.2d 965 (1973).

* * *

There is ample evidence in the record of this case for this Court to hold as a matter of law that a rational trier of fact could have found beyond a reasonable doubt that Mrs. Hurst was killed with a premeditated design by either Hall or Ruffin to avoid subsequent identification of

them by her. The evidence is also legally sufficient for a jury to find that the other was an aider and abettor and, therefore, a principal to the first degree murder.

Accordingly, this claim will be denied.

Hall v. Wainwright, 565 F.Supp. 1222, 1236-37 (M.D. Fla. 1983).

The Eleventh Circuit affirmed holding:

Citing Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), Hall contends his sentence of death is unconstitutional because no proof existed that he killed or intended to kill. In Enmund, the Supreme Court held that the eighth amendment prohibits imposition of the death penalty on an individual who neither took life, attempted to take life, intended to take life, or intended to utilize lethal force. Enmund, 458 U.S. at 979, 102 S.Ct. at 3376, 73 L.Ed.2d at 1151. While we do not dispute Hall's contention that Enmund stands for the proposition that an accused may not be sentenced to death absent proof that he killed, attempted to kill, intended to kill, or intended to use lethal force, we find that evidence existed to support Hall's death sentence.

In determining whether a death sentence is unconstitutionally imposed, we must look to the individual culpability of the accused. Enmund, 458 U.S. at 799-01, 102 S.Ct. at 3377-78, 73 L.Ed.2d at 1153-54; Ross v. Hopper, 716 F.2d 1528, 1529 (11th Cir. 1983). Hall's personal culpability is far more flagrant than that of the accused in Enmund. Earl Enmund drove the getaway car during a robbery at a farmhouse. He was not present at the farmhouse where the murder occurred. The record also failed to disclose that he intended to kill or attempted to kill. Enmund, 458 U.S. at 788-89, 102 S.Ct. at 3372, 73 L.Ed.2d at 1145-46. At the least, Hall was present when Hurst was murdered, and he aided in her abduction. Moreover, Hall's gun was used to murder Hurst. This evidence supports a finding that Hall either took life, attempted to take life, intended to take life, or intended to utilize lethal force.

Therefore, after "examining the individual culpability of the defendant, as did the Supreme Court in Enmund, we conclude that the punishment was not disproportionate in relation to Hall's participation in the crime." Ross v. Hopper, 716 F.2d 1528, 1533 (11th Cir. 1983). See also Henry v. Wainwright, 721 F.2d 990, 995 (11th Cir. 1983). Hall v. Wainwright, 733 F.2d 766, 771 (11th Cir. 1984).

Within this context we note the concurring comments of Judge Jolly on the subject:

> The record in this case does not tell us what Jones and his accomplices separately or collectively intended to do when they drove to downtown Biloxi in December of 1974. It does not tell us what happened inside Art's Levis Store. It does not specify who supplied or carried the weapon that was used to bludgeon Arthur Weinberger to death, and the weapon itself was not introduced at trial. This record does not tell us whether Jones or his accomplice did the actual killing. The state's case consists only of the testimony of several witnesses who observed Jones and his accomplice entering and departing the store, and the testimony of the witness who discovered Weinberger's body inside the store immediately afterwards. Enmund undoubtedly, and unfortunately in this case, requires more.
>
> Jones v. Thigpen, supra, at 817.

Such we submit is erroneous in light of the analysis infra.

Contrary to the rule announced in both Reddix and the case sub judice, it is abundant-

ly clear that Enmund only forbids the imposition of death where the defendant was an accomplice to the attendant felony. Therefore, where, as we find here, the defendant was actually present and aiding and abetting in the commission of the homicide, the requirements of Enmund are met and a sentence of death is appropriate.

Within this context, we note that the Fifth Circuit has consistently held that before death may be imposed there must be some talismatic finding by the trial jury of one of the four Enmund criteria. Such is obviously erroneous. As noted infra, the Court in Enmund plainly stated that it was basing its decision on the findings of the Florida Supreme Court and not the trial court. In particular we note that this Court has denied certiorari on at least three occasions refusing to review cases even though no such talismatic finding was

made. Newlon v. Missouri, ____ U.S. ___, 103 S.Ct. 185, 73 L.Ed.2d 1140 (1982) (Brennan and Marshall, JJ. dissenting from the denial of certiorari); Smith v. Florida, ____ U.S. ____, 103 S.Ct. 3129 (Marshall, J., dissenting from the denial of certiorari); Garcia v. Illinois, _____ U.S. _____, 104 S.Ct. 3555 (Marshall and Brennan, JJ., dissenting from the denial of certiorari). [2]

Enmund is clearly a question properly cognizable under proportionality review. Pulley v. Harris, ____ U.S. _____, 104 S.Ct.

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[2] While we are mindful of the fact that the denial of certiorari is normally of no precedential value, we note the ruling of the Court in Maggio v. Williams, ___ U.S. _____, 78 L.Ed.2d 43, 104 S.Ct. 311 (1983). Apparently, the denial of certiorari on direct appeal from a death verdict has taken on added significance in the wake of Barefoot v. Estelle, _____ U.S. __ ___, 77 L.Ed.2d 1090, 103 S.Ct. 3383 (1983).

871, 79 L.Ed.2d 29 (1984); California v. Ramos, __ U.S. ____, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983); Solem v. Helm, _____ U.S. _____, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Consequently, there is no constitutional infirmity in allowing the Mississippi Supreme Court to make the requisite findings in performing their mandatory sentence review. See: Pulley v. Harris, supra; Miss. Code Ann. § 99-19-105 (Supp. 1983); Williams v. State, 445 So.2d 798 (Miss. 1984). Accord: Leatherwood v. State, supra; Irving v. State, 441 So.2d 846 (Miss. 1983); Stringer v. State, 454 So.2d 468 (Miss. 1984); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983). In this regard we note the ruling in Martin v. Maggio, 711 F.2d 1273 (5th Cir. 1983), to the effect that it is not necessary for the trial court to give limiting instructions on the definition of the aggravating circumstances where State law requires the

State Supreme Court to assess the evidence independently and determine whether the record supports the aggravating circumstances before affirming the sentence of death. See also: Moore v. Zant, 722 F.2d 640 (11th Cir. 1983). Accord: Jackson v. Virginia, 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

We, therefore, submit that the finding by the Mississippi Supreme Court that Jones was an active and willing participant in the robbery and homicide of Mr. Weinberger and that he was obviously in close proximity to the homicide was sufficient under Enmund to impose a sentence of death. We suggest the ruling of the court below interpreting Enmund is erroneous and that certiorari should be granted and a briefing schedule established.

2. Alternatively, The Writ Should Be Granted To Determine Whether Under The Circumstances The Court Of Appeals Erred In Concluding That Enmund Should Be Applied Retroactively

In precluding a new sentencing hearing the court below in pertinent part held:

> We focus on the relationship of two watershed Supreme Court decisions. First, Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), held that one accused of a capital crime but sentenced by a jury to life after a bifurcated proceeding similar to Mississippi's may not on re-trial again be placed in jeopardy of receiving the death penalty. After Bullington, a capital sentencing proceeding like Mississippi's is regarded as a second "trial" at which the prosecution must again "prove its case" if it is to obtain a death sentence. See Arizona v. Rumsey, ____ U.S. ____, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). Second, Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), established an exception to the usual rule that a convicted defendant who prevails in his appeal is subject to retrial. See Tibbs v. Florida, 457 U.S. 31, 39, 102 S.Ct. 2211, 2217, 72 L.Ed.2d 652 (1982). Burks construed

> the Double Jeopardy Clause to preclude retrial if the reviewing court found the evidence legally insufficient to support a conviction. See Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978) (applying Burks to the states). Burks interacts with Bullington: if the jury under Bullington or an appellate court under Burks find the prosecution's evidence in support of the death penalty insufficient, the defendant cannot again be made to face a possible death sentence. Our interpretation of the Double Jeopardy Clause is limited in major part by the considerations that underlie the retroactive application of intervening authority. Were Enmund's holding and its constitutional basis such that it might apply only prospectively, no Double Jeopardy bar would arise. But as we have already discussed, Enmund's rationale requires retroactive application. It follows necessarily from that conclusion and from Burks and Bullington that the Double Jeopardy Clause now forbids the State from placing Jones again at risk of receiving a death sentence.
>
> Jones v. Thigpen, supra, at 814-15.

As the court correctly found, the question of whether any values of the Double Jeopardy Clause are implicated when there has been an appellate finding of insufficient evidence in a

trial was addressed in Burks v. United States, supra. There a defendant was convicted by a jury but the conviction was overturned by an appellate court because of insufficiency of the evidence at trial. In holding that reprosecution was barred by the Double Jeopardy Clause, the Supreme Court articulated the following standard:

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." Green v. United States, 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957); see Serfass v. United States, 420 U.S. 377, 387-388, 95 S.Ct. 1055, 1061-1062, 43 L.Ed.2d 265 (1975); United States v. Jorn, 400 U.S. 470,

479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971).

* * *

> [W]hen a defendant's conviction has been overturned due to a failure of proof at trial, . . . the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal--no matter how erroneous its decision--it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty. [Emphasis added]

437 U.S. at 11, 16, 98 S.Ct. at 2147, 2149.

See also: Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982).

Herein lies the problem. Did the State have a fair opportunity to offer the proof it could assemble? We suggest not.

A review of the opinion in Enmund reveals that in principle the court's decision was predicated on Justice White's concurring opinion in Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978), and the decision in Coker v. Georgia, 433 U.S. 584, 53 L.Ed.2d 982, 97 S.Ct. 2861 (1977). Practically speaking, however, Washington v. Watkins, 655 F.2d 1346, 1366 n. 39 (5th Cir. 1981), was the first case which attempted to address the question of each individual defendant's culpability. However, since 1839, one could be put to death in Mississippi for a killing "when perpetrated without any design to effect death, by a person engaged in the commission of a felony." Hutchison's Miss. Code of 1848, Ch. 64, Art. 12, Title 2. See also Miss. Code of 1857, Ch. 64, Art. 165; Miss. Code of 1871 § 2628; Miss. Code of 1880 § 2875; Miss. Code of 1892 § 1149; Miss. Code of 1906 § 1227; Hemingway's Miss.

Code of 1917 § 957; Miss. Code of 1930 § 985; Miss. Code Ann. § 2215 (1942); Miss. Code Ann. § 97-3-19 (1972); Miss. Code Ann. § 97-3-19 (1974 Supp.); Ch. 429, Miss. Laws of 1983. In this same vein this Court noted that there were seven states with laws like that in Mississippi Enmund, 73 L.Ed.2d at 1147 n. 5, 102 S.Ct. at 3372. Consequently, we are confronted with a situation where respondent was tried over six months prior to the initial indication that the Federal judiciary was even seriously considering altering the common law and a situation where the matter had already been affirmed on direct appeal and certiorari relief denied before the first definitive decision was rendered mandating such prior to the imposition of death. Accord: Reed v. Ross, ____ U.S. ____, 83 L.Ed.2d 1, 104 S.Ct. ____ (1984). Can such be construed then as a fair opportunity to offer proof?

Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973), lends some insight to the solution. In Robinson, the court as in the matter sub judice rejected the government's arguments relating to Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), to cases involving the rule announced in Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970). In particular the Court held:

> We do not believe that this case readily lends itself to the analysis established in Linkletter. Certainly, there is nothing in Linkletter or those cases following it to indicate that all rules and constitutional interpretations arising under the first eight amendments must be subjected to the analysis there enunciated. Linkletter itself announced an exception to the general rule of retroactivity in a decision announcing that the exclusionary rule of Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), would be given prospective effect only. Linkletter, and the other cases relied upon by the Sixth Circuit, dealt with those constitutional interpretations bearing

on the use of evidence or on a particular mode of trial. Those procedural rights and methods of conducting trial, however, do not encompass all of the rights found in the first eight amendments. Guarantees that do not relate to these procedural rules cannot, for retroactivity purposes, be lumped conveniently together in terms of analysis. For the purpose and effect of the various constitutional guarantees vary sufficiently among themselves so as to affect the necessity for prospective rather than retrospective application.

Linkletter indicated, for instance, that only those procedural rules affecting "the very integrity of the factfinding process" would be given retrospective effect. 381 U.S. at 639, 85 S.Ct., at 1743. In terms of some non-procedural guarantees, this test is simply not appropriate. In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), for example, this Court held that in the situation there presented imposition of the death penalty was not constitutionally permissible. Yet, while this holding does not affect the intregrity of the factfinding process, we have not hesitated to apply it retrospectively without regard to whether the rule meets the Linkletter criteria. E.g., Walker v. Georgia, 408 U.S. 936, 92 S.Ct. 2845, 33 L.Ed.2d 753.

93 S.Ct. at 877-78.

The Court, however, tempered its remarks concerning retroactive application where it appears that the State had relied upon past precedent in its ruling:

> We would not suggest that the distinction that we draw is an ironclad one that will invariably result in the easy classification of cases in one category or the other. The element of reliance embodied in the Linkletter analysis will not be wholly absent in the case of constitutional decisions not related to trial procedure, as indeed this case when contrasted with Furman illustrates.
>
> In Furman v. Georgia, supra, our mandate was tailored so as to deny the State only the authority to impose a punishment that we held unconstitutional, without the necessity of a redetermination of the factual question of whether the offense had in fact been committed. Thus, the prejudice to the State resulting from the necessity of an entirely new trial because of procedures newly found to be constitutionally defective, with the attendant difficulties of again assembling witnesses whose memories would of necessity be dimmer for the second trial than for the first, was not present. That which was constitutionally invalid could be isolated and excised without requir-

ing the State to begin the entire factfinding process anew.

The application of Waller retrospectively may, on the other hand, result in a form of prejudice to the State because, in reliance upon the "dual sovereignty" analogy, the municipal prosecution may have occurred first and the sentence already have been severed prior to the commencement of the state prosecution. If the offense involved was a serious one under state law, as it apparently was in this case, the defendant may have been unintentionally accord a relatively painless form of immunity from the state prosecution. But the Court's opinion in Waller makes clear that the analogy between state and municipal prosecutions, and federal and state prosecutions permitted in Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959), had never been sanctioned by this Court and was not analytically sound. Since the issue did not assume federal constitutional proportions until after Benton v. Maryland held the Double Jeopardy Clause applicable to the States, this Court had not earlier had occasion to squarely pass on the issue. But its decision in Waller cannot be said to have marked a departure from past decisions of this Court. Therefore, while Waller-type cases may involve a form of practical prejudice to the State over and above the refusal to permit the trial that the Constitution bars, the justifiability of the State's reli-

> ance on lower court decisions supporting the dual sovereignty analogy was a good deal more dubious than the justification for reliance that has been give weight in our Linkletter line of cases. We intimate no view as to what weight should be accorded to reliance by the State that was justifiable under the Linkletter test in determining retroactivity of the non-procedural constitutional decision such as Waller.
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> 93 S.Ct. at 878-79.

While there may have been dubious reliance on Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959), in Robinson, such cannot be said of Mississippi's reliance on at least 160 years of state [3] and federal precedent. See: Enmund v. Florida, supra (O'Connor, Powell, Renquist, JJ. with whom the Chief Justice joins dissenting). See also: Price v. State, 362 So.2d 204 (Miss. 1978); McNeer v. State, 228 Miss. 308, 87 So.2d 568

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3 Mississippi was admitted to the Union in 1817.

(1956); Carol v. State, 183 Miss. 1, 183 So. 703 (1938); Woodward v. State, 166 Miss. 596, 143 So. 859 (1932); Fisher v. State, 150 Miss. 206, 116 So. 746 (1928). Consequently, there is a fatal flaw in the Fifth Circuit's reasoning.

Within this context, we invite the Court's attention to the case of Linam v. Griffin, 685 F.2d 369 (10th Cir. 1982), a case for all practical purposes on all fours with the matter now before the Court. The question was summarized and disposition made thusly:

> A reversal for trial error does not constitute a decision that the government has failed to prove its case; therefore one can be retried if a conviction is reversed on such a ground. The Court in Burks gave examples of trial court error; incorrect receipt of evidence, incorrect rejection of evidence, incorrect instruction and prosecutorial misconduct. United States v. Ball, 163 U.S. 662, 672, 16 S.Ct. 1192, 1195, 41 L.Ed.2d 300 (1896), was merely distinguished and not reversed by the Burks court because "[it] would be a

high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." United States v. Tateo, 377 U.S. at 466, 84 S Ct. at 1589.

The ruling in Burks was that the prosecution had failed to comply with the rule then established that the burden was on the government to prove sanity, a rule set down in United States v. Smith, 437 F.2d 538 (6th Cir. 1970).

In Linam the court held as a matter of first impression that New Mexico was obligated to prove in an habitual offender hearing that the commission of every felony occurred after the preceding felony conviction. How does this decision differ from that in Burks? It differs because it is merely a formal matter, not a substantive one such as was present in Burks. The rationale is that habitual offender sentences deter commission of subsequent offenses and there is no deterrence when one had never yet been convicted and punished for an earlier offense. The majority view in other states has been that the commission dates as well as the conviction dates have to be introduced in order to show the sequence. There is no problem of whether to produce evidence. The evidence is a matter of record. It waits to be presented properly so that the order of the convictions can become part of

the record. It appears that this has never previously been the rule in New Mexico, whereas other states have held to it although there has been a minority view that prior offenses need not be shown to have been committed after conviction for the preceding offense, which admittedly is not a very good rule.

So, the New Mexico decision in Linam is not one in which the defendant would have been acquitted because the standard was the unknown. It was a new development. Appellant admitted as much as petitioner in certiorari, that prior to Linam New Mexico courts had not required proof that the commission of prior felonies occurred after the immediately preceding conviction.

The conclusion to be drawn is that the New Mexico Court of Appeals' interpretation of § 31-8-5 meets the Burks Court's definition of trial error and is not a true finding of inadequacy of evidence. The Linam decision cannot be interpreted as saying that the prosecution put on all the evidence that it had and came up short, or that there was a negligent failure to carry the burden of proof. Instead it is closer to a reversal and retrial where the trial court has incorrectly excluded evidence, than it is to a finding that the state had its "one bit from the apple" and it failed to meet the burden of proof.

> Thus, double jeopardy does not bar retrial when evidence is incorrectly excluded, 437 U.S. at 15-16, 98 S.Ct. at 2149. It cannot be said that the prosecution is deprived of its opportunity to present its evidence. The Linam holding was applied retroactively to Linam but the procedure adopted in New Mexico was that the Linam case is to be applied prospectively, State v. Valenzuela, 94 N.M. 340, 610 P.2d 744 (1980). This demonstrates that the decision in Linam was not the result of the state's negligently failing to muster its proof. Rather the holding was that the state must henceforth prove the sequence of the commission of convictions.
>
> Id., at 373-74.

See also: Webster v. Duckworth, 572 F.Supp. 1271 (N.D. Ind. 1983); Washington v. Duckworth, 567 F.Supp. 513 (N.D. Ind. 1983).

While we do not, in this alternate proposition, contest the retroactive application of Enmund in light of Walker v. Georgia, 408 U.S. 936, 92 S.Ct. 2845, 33 L.Ed.2d 753 (1972) and Stewart v. Massachusetts, 408 U.S. 845, 33 L.Ed.2d 744, 92 S.Ct. 2845 (1972), we submit

that the invocation of Burks under these circumstances will result in the prejudice the court sought to be avoided in Robinson v. Neil, supra. Here the Supreme Court of Mississippi premised its opinion affirming Jones' sentence of death on the common law rule that proof that Jones was a willing participant in a robbery in the furtherance of which a homicide resulted was sufficient to impose death. Therefore, the advent of Washington or Enmund at a later date introduced a new element into the overall formula which had never heretofore been required. Consequently, one cannot say that the State put on all of the evidence it had and came up short or that there was a negligent failure to carry the burden of proof. Instead, we submit, as the Court found in Linam the error here is closer to a reversal and retrial where the trial court has incorrectly excluded evidence than it is to a finding that the State had its

"one bite from the apple" and it failed to meet the burden of proof. Accord: North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); United States v. Tateo, 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964); United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). Consequently, we urge the Court to grant the writ in order that it may review this question which has never heretofore been addressed.

3. The Court Should Grant The Writ To Determine Whether The Court Of Appeals Erred In Failing To Find That Respondent's Claims Of Ineffective Assistance Of Counsel And Failure To Give A Lesser Included Offense Were Procedurally Barred

As noted infra, relief was granted by the District Court on two grounds; i.e., [1] a violation of this Court's ruling in Enmund and [2] a finding of ineffective assistance of counsel. In both the State courts, on application

for coram nobis relief, and in the lower Federal courts, the petitioners have maintained that respondent's claims of ineffective assistance and the putative violation of this Court's ruling in Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), were barred from review. The Court of Appeals refused to address the effective assistance issue. However, while agreeing with petitioners that the Beck claim was probably barred, the Court concluded that Sykes was "not jurisdictional" and chose to address the claims on the merits. No authority was cited in support of such an option.

Having been the victim of this Court's rule that the judgment may be affirmed on any ground "that the law and the record will permit that will not expand the relief granted below" Thigpen v. Roberts, 468 U.S. _____, 104 S.Ct. 2916, 2918, 82 L.Ed.2d 23, 28 (1984),we raise

the question of the propriety of the lower Courts' decisions relating to the procedural forfeiture issue as such relates to the issue of ineffective assistance of counsel. Read v. State, 430 So.2d 832 (Miss. 1983). Alternatively, we submit that the District Court erred in failing to accord the actions of counsel the "strong presumption" that he exercised reasonable professional judgment as mandated in Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983).

Therefore, should the writ be granted to review the first two claims, in order to avoid the pitfalls of Thigpen v. Roberts, supra, we include the question sub judice.

VII. CONCLUSION

For the foregoing reasons, the petitioners respectfully urge the Court to grant the writ to review the decision of the Court of Appeals.

Respectfully submitted,

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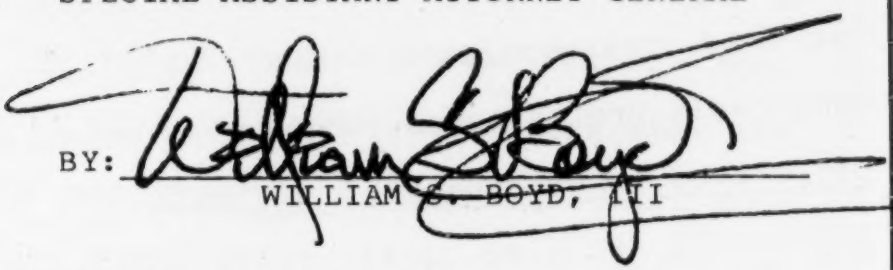
BY: 
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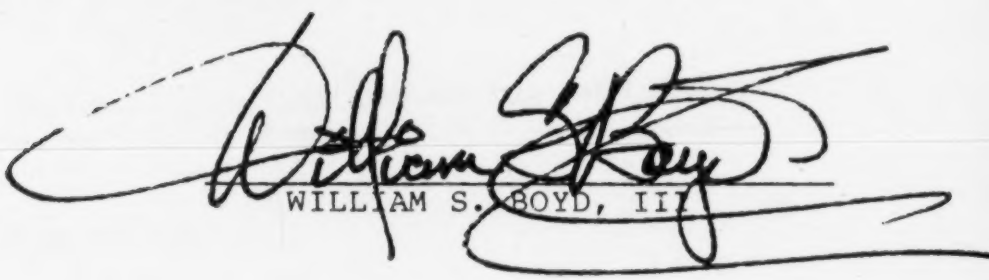
CERTIFICATE OF SERVICE

I, William S. Boyd, III, a Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Petition for Writ of Certiorari to the following:

Thomas H. Freeland, III, Esquire
Thomas H. Freeland, IV, Esquire
Attorneys at Law
1013 Jackson Avenue
Post Office Box 269
Oxford, Mississippi 38655

This, the 30th day of January, 1985.



WILLIAM S. BOYD, III

Larry JONES
Petitioner-Appellee
Cross-Appellant,

v.

Morris THIGPEN, Commissioner, et al.,
Respondents-Appellants
Cross-Appellees.

No. 83-4085.

United States Court of Appeals,
Fifth Circuit

November 1, 1984.

REAVLEY, JOHNSON and JOLLY, Circuit Judges.

On Petition for Rehearing and Suggestion for Rehearing En Banc.

DENIED.

Larry JONES, Petitioner-Appellee
Cross-Appellant,

v.

Morris THIGPEN, Commissioner, Mississippi
Dept. of Corrections, et al.,
Respondents-Appellants Cross-Appellee.

No. 83-4085.
United States Court of Appeals,
Fifth Circuit.

Sept. 17, 1984.

Defendant who had been sentenced to death upon his conviction of capital murder filed petition for writ of habeas corpus. The United States District Court for the Southern District of Mississippi, Dan M. Russell, J., 555 F.Supp. 870, denied relief with regard to defendant's conviction but vacated his death sentence. Appeal and cross appeal were taken. The Court of Appeals, Reavley, Circuit Judge, held that: (1) decision of the United States Supreme Court construing Eighth Amendment to

forbid imposition of death penalty against one who neither took life, attempted to take life nor intended to take life is subject to full retroactive application; (2) defendant's death sentence constituted cruel and unusual punishment because state offered insufficient evidence that defendant who participated in robbery killed or intended to kill robbery victim and because jury instructions did not require a finding that defendant killed or intended to kill victim before death penalty was imposed; (3) because state failed to produce sufficient evidence of personal culpability at first sentencing hearing, it was barred by double jeopardy clause from subjecting defendant again to the sentencing hearing at which he would face a possible death sentence; and (4) since Mississippi law defined no lesser included offense that might have applied to killing which occurred in course of robbery, trial court in capital

murder prosecution was not bound to deliver a lesser included offense instruction.

Affirmed in part; reversed in part and remanded with instructions.

E. Grady Jolly, Circuit Judge, specially concurred with opinion.

1. Courts 100(1)

Judicial decisions ordinarily apply retroactively.

2. Courts 100(1)

A decision establishing that certain conduct cannot 'constitutionally be punished involved the kind of fundamental guarantee that is not susceptible to solely prospective application.

3. Constitutional Law 267
Criminal Law 1159.2(3)

Jury findings both by their nature and as a matter of due process require sufficient

evidence to support them. U.S.C.A. Const.Amend. 5.

4. Courts 100(1)

Decision of United States Supreme Court construing Eighth Amendment to forbid imposition of death penalty against one who neither took life, attempted to take life, nor intended to take life is subject to full retroactive application. U.S.C.A. Const.Amend. 8.

5. Criminal Law 1213.8(8)

Death sentence imposed for felony-murder constituted cruel and unusual punishment because state offered insufficient evidence that defendant killed or intended to kill robbery victim and because jury instructions did not require a finding that defendant killed or intended to kill before imposing death penalty.

6. Criminal Law 163

Where state failed to produce sufficient evidence of personal culpability at first trial for felony-murder to support finding that accused killed, attempted to kill or intended to kill victim, as predicate for death sentence, it was barred by double jeopardy clause from subjecting defendant again to a sentencing hearing at which he would face a possible death sentence. U.S.C.A. Const.Amend. 5.

7. Homicide 308(2)

In view of fact that Mississippi law defined no lesser included offense that might have been applied to murder committed during course of robbery, trial court in capital murder prosecution was not bound to deliver a lesser included offense instruction. Miss.Code 1972, § 97-3-19.

Appeals from the United States District Court for the Southern District of Mississippi.

Before REAVLEY, JOHNSON and JOLLY, Circuit Judges.

REAVLEY, Circuit Judge:

Larry Jones was convicted in Mississippi of capital murder and was sentenced to death. After appealing his conviction and seeking collateral relief in the Mississippi state courts, Jones filed this petition for habeas corpus. The district court denied relief with regard to Jones' conviction but vacated his death sentence on the grounds that he received ineffective assistance of counsel at the sentencing hearing and that the sentence violated Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). The district court authorized the State, if it so chose, to hold a new sentencing hearing at which Jones would again face the possibility of a death sentence. We affirm in major part, but

hold that, because the State failed once to produce evidence of Jones' personal culpability sufficient under Enmund it is now barred by the Double Jeopardy Clause from trying a second time.

I

This is a classic case of felony murder with no eye witnesses. On the morning of December 2, 1974, petitioner Larry Jones and his friend Willie Reddix persuaded Willie's brother J.D. Reddix to drive them to downtown Biloxi in J.D.'s gray Cadillac. Neither Jones nor Willie told J.D. why they needed to go into Biloxi. J.D. drive his brother and Jones downtown and parked the car. J.D. would later testify that Jones was wearing combat boots and that Jones and Willie got out of the car and headed toward Howard Avenue, the general direction of Art's Levis, a clothing store owned by Arthur Weinburger, Lula Mae Bell, the

aunt of Willie and J.D., happened to be downtown shopping that day. After first saying she had not seen Jones and Willie downtown, Bell testified that she saw Jones and Willie get out of J.D.'s car. She remembered that Jones wore fatigues and combat boots.

Orvell McGee was doing road work in Biloxi on the morning of December 2 when he noticed two black men get out of a parked Cadillac at about 11:45 and walk toward Howard Avenue. He remembered that one man, the driver, stayed in the car. Preston Sullivan was also downtown that day. He parked his car about a block from Art's along Howard, and as he walked toward the store, Sullivan noticed a black man carrying a Navy P-coat over his shoulder emerge into the street "in the vicinity of" Art's and head east. Sullivan walked past the man and into the store, where he found Arthur Weinburger lying wounded and unconscious. Sullivan

summoned help. He would later testify that he found Weinburger between 11:30 and 11:45.

Lula Mae Bell testified that she saw Willie with a coat over his shoulder running east along Howard. Ray Real was on his way back from lunch at about 11:45, according to his testimony, when he saw a black man carrying a footlocker and walking west along Howard. Orvell McGee was still at work when he saw the two men who had left the car return. He recalled at trial that they came from different directions - one wore combat boots, carried a footlocker, and returned from the direction of the Kennedy Marie Building; the other had a leather coat over his shoulder and returned from Howard Avenue. The men had left the car with neither a footlocker nor a coat. Neither McGee, Sullivan, nor Real could identify the men they saw that day.

J.D. testified that he waited about 15 minutes before Jones and Willie returned. He testified that Jones came back by Kennedy Marine and that he was carrying a blue footlocker. Willie returned from the direction of Howard Avenue and carried a jacket. The two got into the car and told J.D. to drive back to the Reddix house. They never told J.D. what happened. Annie Reddix, the mother of Willie and J.D., testified that Jones brought a footlocker into her house on December 2. He said it was his, and she let him leave it there. She also testified that Jones was wearing combat boots when he arrived at her house, but that he changed into tennis shoes shortly thereafter.

The investigation proceeded quickly after J.D. was arrested wearing some of the clothing stolen from Art's. Police searched Annie Reddix's house the afternoon after the robbery

and found the footlocker full of clothes; an employee at Art's later identified both the trunk and its contents as having been stolen from the store. Authorities also found a pair of combat boots; later tests revealed that the boots were stained by human blood, particularly the cloth top of the right boot.

Jones was tried in December 1977. [1] J.D. Reddix testified about his drive to Biloxi with Larry and Willie on December 2, 1974. According to J.D., the two said nothing beforehand about what they planned to do downtown and never told him afterward what had happened while he waited in the car. Orvell

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1 Jones' first trial, in March 1975, ended in a conviction and sentence of death. On direct appeal, the Supreme Court of Mississippi reversed and remanded for a bifurcated proceeding as required by Jackson v. State, 337 So.2d 1242 (Miss. 1976). Jones v. State, 342 So.2d 735 (Miss. 1977).

McGee and Preston Sullivan testified about what they saw that day, as did Ray Real, but none of these witnesses identified Willie or Larry as the man they saw and none offered any hint about what happened inside Art's store. J.D. testified that Jones wore combats that day, and the State introduced the boots found stained with blood in the Reddix home. An Art's employee also identified the footlocker and clothes found at the Reddix house as having been stolen from the store.

Jones was accused of "capital murder," defined in Mississippi to include a killing done "with or without any design to effect death" by a person engaged in a robbery. Miss.Code Ann. § 97-3-19 (Supp. 1983). Thus, the trial court apparently delivered a typical felony murder instruction to the jury. [2]

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[2] Inexplicably, the record does not contain the instructions actually given at Jones' trial.

Defense counsel had not requested and the trial court did not give any instructions authorizing the jury to find Jones guilty of a lesser included offense - they were either to find the defendant guilty or not guilty of capital murder. Their verdict was guilty. The court immediately proceeded with the separate sentencing hearing required by Mississippi statute. See Miss.Code Ann. § 99-19-101 (Supp. 1983). The State introduced evidence of the victim's age and size, photographs of the victim taken at the hospital, and evidence of Jones' 1975 armed robbery conviction; the defense offered no evidence at the sentencing hearing. Part of the defendant's final argument was delivered by Jones himself, who sought to persuade the jury that the two black men involved in the robbery were Willie and a man named Roy or Royce. The court instructed the jury about the aggravating and mitigating

circumstances according to Mississippi's capital punishment statute, and the jury returned its verdict the next morning sentencing Jones to death.

Jones appealed to the Mississippi Supreme Court, arguing among other things that the evidence at trial was insufficient to show that he "was actively engaged in an assault upon the victim in the course of the robbery," and that the trial court violated Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). After reviewing the circumstantial evidence we have already recited, the Mississippi court rejected Jones' claim that the evidence was insufficient to show that he actually assaulted Weinburger. Jones v. State, 381 So.2d 983, 987-89 (Miss.), cert. denied, 449 U.S. 1003, 101 S.Ct. 543, 66 L.Ed.2d 300 (1980). The State need not have shown Jones' "precise role" in the killing,

reasoned the court because Mississippi's definition of capital murder includes a killing "done with or without any design to effect death . . .." 381 So.2d at 989 (quoting Miss.Code Ann. § 97-3-19(2)(e). [3] The court then rejected Jones' Witherspoon claim, id. at 992, and affirmed both his conviction and sentence.

Jones sought collateral review according to state procedure on March 3, 1981, by moving the Mississippi Supreme Court for leave to petition the trial court for a writ, either of error coram nobis or of habeas corpus. See Miss.Code Ann. § 99-35-145 (1973). Jones challenged his conviction on several grounds,

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[3] The court noted, however, that Jones had not argued "that the legislature lacks the power to expose him to guilt of capital murder in the absence of proof that he had specific intention to kill." Id. at 989.

among them that the facts required the trial court to instruct the jury on "the lesser included offense of simple murder," and that the court's failure to deliver such an instruction violated Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). He also argued that his death sentence constituted cruel and unusual punishment for several reasons, including the fact that he was convicted under Mississippi's capital murder statute with no finding that he killed or intended to kill Arthur Weinburger. [4] The

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[4] Jones also reargued his Witherspoon claim, contended that he had not had sufficient time to prepare for the sentencing hearing, and repeated his argument that he could not be convicted of capital murder under Mississippi law merely because he participated in the robbery. In his last connection, he asserted that state law required proof that he, not an accomplice, "committed or participated in the commission of the murder."

State responded to most of Jones' arguments on their merits. The single relevant exception was its answer to the Beck claim, in which the State noted that Jones had not requested an instruction on lesser included offenses at trial and had never presented the Beck argument at any stage in the state proceedings. The Mississippi Supreme Court denied the motion with no explanation on April 1, 1981:

> This day this cause came onto be heard on motion for leave to file petition for writ of error coram nobis and/or for a writ of habeas corpus and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order that said motion be and the same is hereby denied.

Jones had filed his petition for federal habeas on March 9, 1981, shortly after moving for collateral relief in the Mississippi Supreme Court. To the extent they remain on

appeal, Jones' arguments in support of federal habeas relief were that his conviction violated due process under Beck because of the trial court's failure to instruct on a lesser included offense; that the jury was selected in violation of Witherspoon; that he received ineffective assistance of counsel at the sentencing hearing; and that his sentence to death with neither finding nor proof that he killed or intended to kill constituted cruel and unusual punishment. The State's response concerning the exhaustion requirement was ambiguous. Noting first that Jones had raised "certain grounds" in his federal petition that had not first been presented to the state courts, the State explicitly waived the exhaustion requirement in the interest of obtaining "expeditious consideration." In the same paragraph, however, the State expressed its intention to rely on the argument that

"[t]here are independent and adequate state procedural grounds which prevent review here of certain issues which could have [been] but were not raised in the State Court system."

After two hearings, the district court issued its opinion and order granting relief with regard to Jones' sentence. 555 F.Supp. 870 (S.D. Miss. 1983). The court considered state remedies to be exhausted with regard to all grounds asserted by Jones: they were all presented on motion for collateral relief to the Mississippi Supreme Court, which was presumed to have reached the merits in the absence of its expressed reliance on a state procedural default committed by Jones. The district court then rejected Jones' Witherspoon and Beck claims on their merits. It set aside the death sentence for two alternative reasons, however. First, the sentence constituted cruel and unusual punishment under Enmund for lack of

a finding by the jury that Jones killed, attempted to kill, or intended to kill. Second, Jones received ineffective assistance of counsel at the sentencing hearing because his attorney failed to present evidence that Jones was mildly mentally retarded. The court authorized the State to hold a new sentencing hearing, expressly rejecting Jones' argument that such a hearing would violate the Double Jeopardy Clause.

II

Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), construed the Eighth Amendment to forbid imposition of the death penalty against "one who neither took life, attempted to take life, nor intended to take life." Id. at 786, 102 S.Ct. at 3371. Jones' major claim, therefore, is that his death sentence must be set aside because here was neither a finding nor sufficient evidence

to support a finding that Jones killed or intended to kill Arthur Weinburger in the course of robbing his store. [5] The district court agreed that the jury instructions in both the guilt and sentencing phases of Jones' trial failed to require a finding that Jones killed or intended to kill. Its opinion includes a footnote, however, stating that the record contains "evidence . . . from which a jury

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[5] This claim is properly before us, for the State has waived the exhaustion requirement and asserts no procedural default with respect to the Enmund claim that might bar federal review. See McGee v. Estelle, 722 F.2d 1206 (5th Cir. 1984) (en banc). Despite its waiver of the exhaustion requirement, the State cryptically urges that we certify to the Mississippi Supreme Court the question "whether as a matter of State law the petitioner intended that a killing would take place." The question of intent is one of fact and evidence, not law. We therefore decline the State's invitation.

could determine the petitioner's individual culpability." The court therefore vacated Jones' death sentence, but extended the State an opportunity to resentence Jones to death after a new hearing and upon a finding consistent with Enmund.

A

The State argues first that Enmund ought not be retroactively applied. It argues uphill, for we recently applied Enmund to vacate the death sentence imposed on Jones' accomplice, Willie Reddix, only days before Jones was tried. Reddix v. Thigpen, 728 F.2d 705 (5th Cir. 1984); see also Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983); Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982) (like Skillern, applying Enmund retroactively and denying relief on that ground), cert. denied, ___ U.S. _____, 104 S.Ct. 142, 78 L.Ed.2d 134 (1983). But because the State did not argue in

Reddix that Enmund should apply only prospectively, we pause to consider the issue.

[1] Judicial decisions ordinarily apply retroactively. See Robinson v. Neil, 409 U.S. 505, 507-08, 93 S.Ct. 876, 877-78, 35 L.Ed.2d 29 (1973). "Indeed, a legal system based on precedent has a built-in presumption of retroactivity." Solem v. Stumes, ____ U.S. _____, _____, 104 S.Ct. 1338, 1341, 79 L.Ed.2d 579 (1984). In 1965, however, the Supreme Court began to shape a retroactivity analysis to be applied when it announced rules of a procedural character. Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); see Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). But cases articulating certain fundamental guarantees do not lend themselves to the retroactivity analysis established in Linkletter and systematized in Desist. See

Robinson, 409 U.S. at 508, 93 S.Ct. at 878. Among those guarantees that have been excluded from normal Linkletter analysis are the Eighth Amendment prohibition against capital punishment announced in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), see, e.g., Stewart v. Massachusetts, 408 U.S. 845, 92 S.Ct. 2845, 33 L.Ed.2d 744 (1972) (per curiam), and the Fifth Amendment's prohibition against double jeopardy. See, e.g., Robinson, 409 U.S. at 510-11, 93 S.Ct. at 879.

[2] A decision establishing that certain conduct cannot constitutionally be punished involves just the sort of fundamental guarantee that is not susceptible to solely prospective application. See United States v. United States Coin and Currency, 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971). Indeed, the Supreme Court immediately applied retroactively

its holding in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), that the Eighth Amendment forbade execution of a defendant convicted of raping an adult woman. See Eberheart v. Georgia, 433 U.S. 917, 97 S.Ct. 2994, 53 L.Ed.2d 1104 (1977); Hooks v. Georgia, 433 U.S. 917, 97 S.Ct. 2994, 53 L.Ed.2d 1104 (1977). Coker was the last time before Enmund that the Court had prohibited capital punishment for a certain species of criminal conduct, and it provided the Eighth Amendment analysis followed five years later by the Enmund Court.

Enmund absolutely forbids a form of punishment, death, when the accused is not shown and found to have killed or attempted to kill or intended to kill. We cannot imagine applying such a holding only prospectively and, simply because Jones' trial predated the Enmund decision, allowing Jones' execution to proceed

in the face of Enmund's holding that it would constitute cruel and unusual punishment. The State does actually argue that Enmund's holding is merely procedural and should therefore be applied only prospectively. The patent frivolousness of such an argument is nicely focused by Jones' statement of the issue: "Should Enmund be applied retroactively, or should the state be permitted one last cruel and unusual punishment before Enmund takes effect?"

[3] The only other imaginable application of Enmund short of full retroactivity is to extend back in time its requirement of a finding that the accused killed or intended to

kill, but to apply only prospectively its requirement of sufficient evidence to support that finding. [6] First, such an application dishonors Enmund by divorcing its fundamental requirement of a jury finding from the logically inextricable requirement that such a finding be supported by sufficient evidence in the record. Jury findings both by their nature and as a matter of due process require sufficient evidence to support them. See

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6 Such an application is suggested by the fact that the State urges its retroactivity argument here, in apparent anticipation of our holding that the evidence of intent to kill was insufficient, but not in Reddix, where the evidence of intent was predictably held adequate. In Jones, retroactive application of Enmund bars the State from ever imposing the death penalty, see section III(c), infra (double jeopardy analysis); in Reddix it worked no such result. See Reddix, 728 F.2d at 710-11.

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We have at least implied that Enmund includes a sufficiency-of-the-evidence component, see, Reddix, 728 F.2d at 710; Skillern, 720 F.2d at 843-49, and our careful review of the Court's opinion confirms that view. We find no basis in Enmund to detach a jury finding from the evidence or lack of evidence to support it.

Even the considerations underlying Linkletter and Desist suggest that Enmund be applied retroactively with its full force. The State's major concern is that law enforcement authorities may have relied on the state of the law before Enmund came down in 1982. It argues that the only signposts on the way to Enmund were the cases concerning nonstatutory mitigating factors that focused on the "concept of individualized sentencing." Lockett v. Ohio, 438 U.S. 586, 602, 98 S.Ct. 2954, 2963,

57 L.Ed.2d 973 (1978); see also Washington v. Watkins, 655 F.2d 1346, 1367-77 (5th Cir. 1981), cert. denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982). Enmund was neither a "clear break from the past," Desist, 394 U.S. at 248, 89 S.Ct. at 1033, nor "distinctly foreshadowed" by earlier cases. Brown v. Louisiana, 447 U.S. 323, 336, 100 S.Ct. 2214, 2224, 65 L.Ed.2d 159 (1980) (plurality). It followed the analysis in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), a decision announced only six months before Jones' trial, but was by no means the necessary consequence of Coker's holding. Nevertheless, Coker offered thoughtful prosecutors the jurisprudential tool with which they might at least have anticipated the problem resolved in Enmund.

More reassuring is the simple impulse of law enforcement authorities to collect and

present whatever relevant evidence is available. Nothing before Enmund gave one prosecuting a felony murder case any reason to hesitate about offering available proof that a particular defendant either killed or harbored an intent to kill. We are confident that had such admissible evidence been available, the State would have presented it, either at Jones' trial or during the sentencing hearing.

Finally, our fully retroactive application of Enmund works no seriously disruptive effect on the administration of justice. The State wildly exaggerates by suggesting that our decision will affect all death row inmates in each of the seven states that imposed capital punishment for felony murder at the time Enmund was decided. Even if that prospect troubled us, we believe the prediction unjustified. The Enmund Court itself noted that its holding touched only a handful of death row inmates.

458 U.S. at 791-97, 102 S.Ct. at 3375-76. We know of no other case in which an Enmund claim has succeeded on grounds of insufficient evidence, and we are led to believe that most of the few death sentences based on felony murder convictions are supported by Enmund evidence sufficient under the Jackson standard. The double jeopardy bar will be infrequent indeed.

[4] In light of Jones' sufficiency argument and of our obligation to reach claims that may bear double jeopardy significance, see French v. Estelle, 692 F.2d 1021 (5th Cir. 1982), modified on other grounds, 696 F.2d 318 (5th Cir.), cert. denied, ____ U.S. ____, 103 S.Ct. 2108, 77 L.Ed.2d 313 (1983), we can find no basis consistent with the purposes behind Enmund and the policies served by the Double Jeopardy Clause to dissect the Enmund rationale to avoid a double jeopardy bar.

B

[5] Enmund requires that before a state may impose the uniquely severe and irrevocable sentence of death it must "focus on the personal intent and culpability of the defendant himself, and not merely that of an accomplice." Reddix, 728 F.2d at 708. To that end, the Curt established an Eighth Amendment principle that exists at two levels: first, an accused may not constitutionally receive the death penalty except upon a finding that he himself killed, attempted to kill, or intended to kill; and second, he may not be sentenced to death unless that finding is supported by sufficient evidence in the record. See Skillern, 720 F.2d at 843-49.

Jones contends that the evidence was insufficient to support any possible finding that he participated in killing Arthur Weinburger or that he intended the killing to

take place. We are therefore to determine whether the evidence was such that a properly instructed, rational jury could have found beyond a reasonable doubt that Jones killed or intended to kill. [7] Skillern, 720 F.2d at 844; see Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791-92, 61 L.Ed.2d 560 (1979).

The State rests its position that the evidence was sufficient on only two grounds: [8]

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7 The claim is before us, for it was raised below and rejected by the district court. 555 F.Supp. at 879 n. 8.

8 The State would also distinguish Enmund on its facts. Enmund drove a get-away car and was outside the house as his accomplices killed the Kerkseys within, argues the State; Jones was at least physically present at the scene of the killing. The distinction is without a difference, however, for like Enmund, Jones himself has not been shown to have killed or intended to kill. His presence

first, the mass of circumstantial evidence quite compellingly shows that Jones participated in the robbery of Art's Levis; and second, the blood found on Jones' combat boots - particularly on the top of one boot - allows a fair inference that Jones was present when Weinburger was killed. [9] Our question after Enmund is whether the evidence was sufficient to show that Jones himself actually killed or intended to kill. After searching the record, we conclude it was not.

The record is more than sufficient to show that Jones and Willie Reddix robbed Art's Levis, that its owner was killed in the course of that robbery, and that Jones was present when the killing occurred. But the evidence

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(Footnote 8 Continued)

at the scene supports no such inference.

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9 The State also relies on the fact that Jones returned to J.D.'s car with some of the items stolen from Art's.

concerning events before and after the robbery offers no indication which robber killed Weinburger, cf. Ross v. Hopper, 716 F.2d 1528, 1533 (11th Cir. 1983) (evidence sufficient to show that accused actually killed victim), reh'g en banc granted, 729 F.2d 1293 (11th Cir. 1984), or that either man intended in advance that the killing would take place. Cf. Skillern, 720 F.2d at 844 (evidence sufficient to show accused agreed with accomplice before robbery that victim would be killed); Stanley v. Zant, 697 F.2d 955, 972-73 (11th Cir.) (same), rev'd on other grounds, ___ U.S. _____, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The nature of the murder itself supports no inference that both Jones and Willie played a part, and we find no evidence about possession or ownership of the murder weapon. The only direct evidence of what happened inside the store was the presence of

blood stains on the top of Jones' combat boots. Circumstantial evidence places Jones in the store with Willie Reddix at the time Weinburger was killed and the blood stains may place him near the victim, but we find absolutely nothing to show that he actually

killed or even intended any physical harm to Weinburger. See Turner v. McKaskle, 721 F.2d 999, 1002 (5th Cir. 1983). [10]

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10 See also Clark v. Maggio, 737 F.2d 471 (5th Cir. 1984). Clark participated in the 1975 robbery of a motel in the course of which a night bookkeeper was killed. He was indicted, convicted and sentenced to death under Louisiana's first degree murder statute, which required proof that Clark intended to kill or inflict great bodily harm. The Louisiana Supreme Court vacated his death sentence and remanded for resentencing to life imprisonment. We held that mere participation in a robbery is insufficient under Jackson to support a finding of intent on the part of one robber in connection with a murder committed by another. Id., at 474 (citing Clark v. Louisiana State Penitentiary, 694 F.2d 75, 78 (5th Cir. 1982). We found no prejudice to Clark, however, because he ultimately received the same sentence as would have been available under Louisiana's second-degree felony murder statute, which required no proof of intent.

This result may at first seem inconsistent with Reddix, in which we found evidence sufficient for a reasonable jury to have concluded that Willie Reddix "had a personal criminal intent justifying the imposition of the death penalty." 728 F.2d at 710. But Reddix differs from this case in one crucial respect: Reddix confessed; Jones did not. Reddix stated in his confession that he participated in Weinburger's killing by diverting the victim's attention while Jones hit him from behind. Id. at 711 n. 6. That confession is obviously not a part of our record, and Willie Reddix did not testify against Jones.

Jones also contends that Enmund's other prong was violated because the jury was never required to make a finding whether Jones killed or intended to kill. The State apparently does not argue that the instructions given in this

case required a jury finding consistent with Enmund. Although the instructions given at the guilt phase of Jones' 1977 trial are not in the record, [11] the State does not argue that they differed materially from Mississippi's statutory definition of capital murder, which

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[11] The record does contain the instructions given at Jones' trial in 1975. Those instructions unmistakably allowed the jury to convict without proof that Jones killed Weinburger or that he intended that the killing take place.

does not require proof that the accused killed or intended to kill. See Miss.Code Ann. § 97-3-19 (Supp. 1983). [12] We do have an instruction given at the sentencing hearing, but nowhere did it require the jury to find that Jones killed or intended to kill before imposing the death penalty. Cf. Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983)

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12 Mississippi has since amended its death penalty statute to require an Enmund finding:

> In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:
> (a) The defendant actually killed;
> (b) The defendant attempted to kill;
> (c) The defendant intended that a killing take place;
> (d) The defendant contemplated that lethal force would be employed.

Miss.Code Ann. § 99-19-101(7) (Supp. 1983).

(instruction at sentencing phase cured Enmund flaw). We therefore agree with the district court that the jury instructions in this case were insufficient to support a death sentence.

Jones' death sentence constitutes cruel and unusual punishment under Enmund because the State offered insufficient evidence that Jones killed or intended to kill Weinburger and because the jury instructions did not require a

finding consistent with Enmund before the death penalty was imposed. [13] We now consider whether the State may again expose Jones to a possible death sentence.

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13 Enmund does not require that we disturb Jones' conviction. The "capital murder" statute under which he was convicted defines the offense usually termed felony murder as a killing done "with or without any design to effect death" by anyone engaged in the commission of certain crimes, one of which is robbery. Miss.Code Ann. § 97-3-19 (Supp. 1983). We have already noted that the capital murder statute "does not require imposition of capital punishment, and the Eighth Amendment, as interpreted by Enmund, is not implicated as long as the sentence imposed is not capital punishment." Reddix, 728 F.2d at 708 (footnote omitted; emphasis in original); see Skillern, 720 F.2d at 846-47. Cf. Clark v. Maggio, 737 F.2d 471 (5th Cir. 1984) (considering effect of prosecution's failure to prove intent under Louisiana's first degree felony murder statute, which required such proof).

C

[6] Jones argues that the Double Jeopardy Clause prevents the State from subjecting him again to a sentencing hearing at which he would face a possible death sentence. The district court anticipated Skillern in its view that an Enmund violation ordinarily may be cured by a new sentencing hearing with a jury properly instructed according to Enmund that death may be imposed only on a finding that the accused killed, attempted to kill, or intended to kill. Jones contends, however, that Enmund's is a rule of evidentiary sufficiency, and that because the State failed to produce sufficient evidence of personal culpability at the first trial it is barred by the Double Jeopardy Clause from a second chance. We agree with Jones and therefore reverse the district court's judgment to the extent that it allows the State again to place Jones in jeopardy.

We focus on the relationship of two watershed Supreme Court decisions. First, Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), held that one accused of a capital crime but sentenced by a jury to life after a bifurcated proceeding similar to Mississippi's may not on retrial again be placed in jeopardy of receiving the death penalty. After Bullington, a capital sentencing proceeding like Mississippi's is regarded as a second "trial" at which the prosecution must again "prove its case" if it

is to obtain a death sentence. See Arizona v. Rumsey, _____ U.S. _____, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). [14] Second, Burks v. United

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14 Mississippi does not seek to distinguish its bifurcated sentencing proceeding from that of Missouri analyzed in Bullington; the two are similar in all relevant respects. That fact, together with the Supreme Court's recent decision in Rumsey, leads us to distinguish Knapp v. Cardwell, 667 F.2d 1253, 1264-65 (9th Cir.) (relying in part on fact that sentencer was judge, not jury; Rumsey later rejected the distinction), cert. denied, 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982). Knapp merely held that Bullington does not raise a double jeopardy bar at a second sentencing hearing as to each aggravating circumstance found not to exist at the first sentencing hearing. Aggravating circumstances are applied together and in the disjunctive to justify imposition of a death sentence. Enmund's requirement is absolute - no defendant may be sentenced to die but upon proof he killed, intended to kill, or attempted to kill; the prosecutor's failure to produce

States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), established an exception to the usual rule that a convicted defendant who prevails in his appeal is subject to retrial. See Tibbs v. Florida, 457 U.S. 31, 39, 102 S.Ct. 2211, 2217, 72 L.Ed.2d 652 (1982). Burks construed the Double Jeopardy Clause to preclude retrial

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(Footnote 14 Continued)

> sufficient evidence to support such a finding at the first sentencing cannot, consistently with the Double Jeopardy Clause, be given a second chance.

if the reviewing court found the evidence legally insufficient, to support a conviction.[15] See Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978) (applying Burks to the states). Burks interacts with Bullington: if the jury under Bullington or an appellate court under Burks

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15 The Supreme Court's recent Justices of Boston Municipal Court v. Lydon, ____ U.S. ____, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984), does not affect Burks' recognition that retrial is barred upon a reviewing court's determination that the evidence at the first trial was legally insufficient. Lydon recast Burks' holding in terms of continuing jeopardy, but held only that initial jeopardy does not terminate without some event - either an acquittal or a judicial determination of evidentiary insufficiency. ____ U.S. at _____, 104 S.Ct. at 1813-14. Bound to reach Jones' claim of insufficient evidence, French, 692 F.2d at 1024, we uphold that claim; this decision therefore terminates Jones' initial Bullington jeopardy.

finds the prosecution's evidence in support of the death penalty insufficient, the defendant cannot again be made to face a possible death sentence. [16] Our interpretation of the Double

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16 The State argues that Tapp v. Lucas, 658 F.2d 383 (5th Cir. 1981), cert. denied, ____ U.S. ___, 102 S.Ct. 2233, 72 L.Ed.2d 845 (1982), somehow requires a different result. The Mississippi Supreme Court had reversed Tapp's conviction on the ground that his wife should not have been forced to testify; in its opinion, that court noted that without the wife's testimony "the record on the first trial . . . would not sustain a conviction." Tapp v. State, 347 So.2d 974, 977 (Miss. 1977). We rejected Tapp's double jeopardy challenge after his second trial: "Because the Mississippi Supreme Court made clear that Tapp's first conviction was reversed for trial error, . . . Tapp's second trial was not precluded by the double jeopardy clause." 658 F.2d at 385. Tapp has no bearing here, for we have concluded that the evidence supporting Jones' death sentence was indeed insufficient.

Jeopardy Clause is limited in major part by the considerations that underlie the retroactive application of intervening authority. Were Enmund's holding and its constitutional basis such that it might apply only prospectively, no Double Jeopardy bar would arise. But as we have already discussed, Enmund's rationale requires retroactive application. It follows necessarily from that conclusion and from Burks

and Bullington that the Double Jeopardy Clause now forbids the State from placing Jones again at risk of receiving a death sentence. [17]

III

[7] Jones challenges his capital murder conviction in only one argument remaining on appeal. He contends that he was denied due process under Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), by the

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17 Having concluded that Jones' death sentence violates Enmund, we need not reach petitioner's claim that he was denied effective assistance of counsel at the 1977 sentencing hearing. We also do not reach his claim that the trial court's exclusion of certain jurors violated Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), for such a claim draws into question only a death sentence and has no bearing on the underlying conviction. Id. at 522 n. 21, 88 S.Ct. at 1777 n. 21; see Alderman v. Austin, 695 F.2d 124, 126 (5th Cir. 1983) (Unit B) (en banc).

trial court's failure to instruct the jury that they might convict him of the lesser included offense of simple murder. The argument is without merit for several reasons. [18]

Beck held that the death penalty could not be imposed because the trial court had

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18 The State vigorously maintains that our review of this claim is barred because Jones' defense attorney neither requested a lesser-included-offense instruction at trial nor complained of its omission on direct appeal. See Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Our consideration of that argument is complicated by the Mississippi Supreme Court's failure to explain its denial of Jones' motion for collateral relief, in which this due process claim was unambiguously raised. While we are inclined to agree with the State, see O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984), the contention is not jurisdictional and we choose to reject Jones' claim on its merits.

eliminated from the jury's consideration a non-capital "third option" by failing to instruct on s lesser-included offense. Under Alabama law, an intentional killing committed in the course of a robbery is a capital offense; intent to kill cannot be supplied by the felony-murder doctrine, however, and a killing during a robbery without that independent element of intent does not expose the accused to a death sentence. Nevertheless, the statute prohibited the judge from instructing on non-capital felony murder when the defendant was charged with intentional, or capital, murder. The jury was given the choice of either convicting the defendant of capital crime, in which case it was required to impose the death penalty, or of acquitting him. Id. at 628-29, 100 S.Ct. at 2385. This, the Supreme Court held, denied the jury a middle

ground and thereby introduced too great an element of chance in capital cases.

Beck is not implicated in this case. We noted in Bell v. Watkins, 692 F.2d 999 (5th Cir. 192), that Mississippi law offers nothing to parallel Alabama's lesser-included felony murder offense: "In Mississippi, no murder committed during the course of a robbery can be a simple murder." Bell, 692 F.2d at 1004-05 (citing Miss.Code Ann. § 97-3-19(2)(e) (Supp. 1982). Bell rejected the death-sentenced petitioner's claim that his Mississippi trial was flawed under Beck for lack of instructions on the lesser included offenses of simple murder or manslaughter: because there was no lesser charge available under Mississippi law, Beck imposed no due process duty to instruct on a lesser offense. Jones would expand Beck to require that Mississippi define an offense that might stand as a "third option" when the state

charges capital murder. The Supreme Court has now rejected that construction of Beck. Spaziano v. Florida, ____ U.S. ____, 104 S.Ct. 3154, 81 L.Ed.2d _____ (1984), held that Beck does not require instruction on a lesser included offense that was barred by a state statute of limitations: "Where no lesser included offense exists, a lesser included offense instruction detracts from rather than enhances, the rationality of the process. Beck does not require that result." After Spaziano, Beck can be read only to require instruction in capital cases on lesser included offenses available under state law. Mississippi defines no lesser included offense that might have applied to this robbery-killing, Bell, 692 F.2d at 1004-05, and the trial court in this case was therefore not bound by Beck to deliver a lesser included offense instruction.

IV

Jones was proven and found to have participated in a robbery during which the owner of the store was killed, but he was neither proven nor found to have done the killing or intended that it take place. Enmund's interpretation of the Eighth Amendment requires that we vacate Jones' death sentence, and the Double Jeopardy Clause prevents its reimposition. Jones has shown no constitutional infirmity in his conviction.

We therefore AFFIRM the judgment of the district court insofar as it denies relief as to Jones' conviction and insofar as it vacates Jones' death sentence. We REVERSE that judgment, however, insofar as it authorizes the State of Mississippi to hold another sentencing hearing at which Jones would again face a possible death sentence, and we REMAND with instructions to enter an order authorizing the

State to resentence Jones to a penalty less than death.

E. GRADY JOLLY, Circuit Judge, specially concurring:

I agree with the majority that Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 3369, 73 L.Ed.2d 1140 (1982), and the Double Jeopardy Clause require us to grant Jones the relief he requests. I specially concur only to emphasize that our decision rests on the fact that the record before us contains absolutely no evidence that Jones himself "took life, attempted to take life, [or] intended to take life." Id. at 787, 102 S.Ct. at 3371.

The record in this case does not tell us what Jones and his accomplices separately or collectively intended to do when they drove to downtown Biloxi in December of 1974. It does not tell us what happened inside Art's Levis Store. It does not specify who supplied or

carried the weapon that was used to bludgeon Arthur Weinburger to death, and the weapon itself was not introduced at trial. This record does not tell us whether Jones or his accomplice did the actual killing. The state's case consists only of the testimony of several witnesses who observed Jones and his accomplice entering and departing the store, and the testimony of the witness who discovered

Weinburger's body inside the store immediately afterwards. Enmund undoubtedly, and unfortunately in this case, [1] requires more.

Had the state introduced any evidence that Jones killed or assisted his accomplice in killing Arthur Weinburger, or that he supplied the murder weapon, or even that he knew his

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[1] Reddix, Jones's accomplice, stated in his confession that "Larry hit the man about three times with a Stilson wrench." Reddix v. Thigpen, 728 F.2d 705, n. 6 (5th Cir. 1984). The confession, however, was not admissible at Jones's trial. Enmund, compels the anomalous result that two can avoid a capital murder conviction where one could not. If Jones had been alone in this crime, we could, on the evidence against him in this record, uphold a capital murder conviction. If he had been alone the jury could have reasonably inferred that he took the life of Art Weinburger. From this record we cannot say whether it was he or his accomplice or both, and thus neither may receive the death sentence.

accomplice intended that a killing occur, we would reach a different result in this case. Without such evidence, however, we cannot ascribe the personal culpability to Jones that Enmund and the eighth amendment require before the state may sentence him to death.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

LARRY JONES PLAINTIFF

VS. CIVIL ACTION NO. S81-0109(R)

MORRIS THIGPEN, COMMISSIONER,
MISSISSIPPI DEPARTMENT OF
CORRECTIONS, ET AL. DEFENDANTS

OPINION

I. BACKGROUND

On December 2, 1974, Arthur Weinberger was killed in his place of business in Biloxi, Mississippi. Three men, Willie Reddix, J. D. Reddix, and Larry Jones, were indicted for capital murder pursuant to MISS CODE ANN. § 97-3-19(2)(e) (1972). The indictment charged that these three men murdered Arthur Weinberger while they were engaged in the commission of a felony - armed robbery. Larry Jones entered a plea of not guilty to the indictment.

The case was called for trial in the Circuit Court of Harrison County and on March 19, 1975, Jones was found guilty of capital murder. He appealed to the Mississippi Supreme Court where the case was reversed and remanded with instructions to follow the procedure outlined in Jackson v. State, 337 So.2d 1242 (Miss. 1976). See Jones v. State, 342 So.2d 735 (Miss. 1977).

verdict of guilty to the crime of capital murder and on the following day, the same jury sentenced him to death by lethal gas.

On December 16, 1977, Jones filed a motion for a new trial; said motion was overruled and an appeal to the Mississippi Supreme Court was timely perfected. The court affirmed the conviction and sentence, Jones v. State, 381 So.2d 983 (Miss. 1980), and subsequently denied Jones' petition for rehearing.

Jones then filed a petition for writ of certiorari in the United States Supreme Court and on November 17, 1980, the petition was denied. Jones v. Mississippi, 449 U.S. 1003 (1980).

On March 3, 1981, Jones filed a motion for leave to file a petition for a writ of error coram nobis or habeas corpus in the Mississippi Supreme Court. On April 1, 1981, the petition was denied.

Thereafter, Jones filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

II. STANDARD OF REVIEW

28 U.S.C. § 2254 requires exhaustion of all state remedies. A federal court is barred from addressing claims in a habeas petition which were not the subject of timely objection under the state's procedural rules. Specifically, if a defendant is required by

state law to raise a timely challenge to a particular point and fails to do so he is barred from raising the claim in a federal habeas proceeding absent a showing of "cause" excusing his double procedural default and "actual prejudice" resulting from the errors of which he complains. Wainwright v. Sykes, 433 U.S. 28 (1977). See also Engle v. Issac, 50 wherein the court stated:

> The government next argues that consideration of the merits of Miller's federal claim is barred under Wainwright v. Sykes ... for failure to contemporaneously object and seek relief from the conduct of which he complains. We note, however, that the denial of habeas corpus relief at the state level was not based upon appellant's failure to timely object, but, rather, was a decision on the merits. It is well settled that a federal court is not barred from considering the merits of a ground for relief by reason of the fact that petitioner failed to make a contemporaneous objection, where the state courts did not rely upon the contemporaneous objection rule in denying relief.... This principle

> applies irrespective of how briefly or summarily the state court treats the merits of a petitioner's claim.

Id. (Footnote and citations omitted).

In the denial of petitioner's motion for leave to file a petition for writ of error coram nobis and/or writ of habeas corpus, the Mississippi Supreme Court's form entry on the minutes stated:

Jones contends that this summary denial was a decision on the merits and one in which the state supreme court did not rely upon the contemporaneous objection rule in denying his requested relief. Conversely, the state argues that this is not such a case. No findings of fact, conclusions of law, or any matters relative to the merits of the petition were considered by the supreme court. The state contends that Miller and the cases cited therein were cases where various state courts addressed a particular constitutional question

before it resulted in a waiver of the "waiver defense".

The Fifth Circuit has recently held that "failure to state whether a writ of coram nobis was denied on the merits or for procedural default creates a presumption that it was considered on the merits and does not bar federal habeas review." Bell v. Watkins, No. 81-4358, slip op. at 958 (5th Cir. Dec. 6, 1982). On the basis of Bell, the Court concludes that the supreme court did not rely upon state procedural grounds in denying the petitioner's requested relief and therefore, the Court is not precluded from reviewing the petitioner's claims.

A. Witherspoon Issues

During voir dire, four prospective veniremen indicated that they harbored conscientious scruples against the death penalty. These jurors were then questioned in

an effort to determine the extent of their opposition to the death penalty and to what degree it would influence them in any future deliberations. [1] Jones contends that he was

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[1] BY THE COURT: Ladies and gentlemen, the charge against the Defendant in this case is that of capital murder. You've been summonsed [sic] here as potential jurors on the charge. If the jury should find the verdict of guilty, a second hearing will be held to determine whether or not the Defendant should receive the sentence of death or life imprisonment. I therefore ask you, ladies and gentlemen, if any of you have any conscientious scruples against the infliction of the death penalty when the law authorizes it in proper case and where the death penalty warrants it. Special panel number one? Do any of you have conscientious scruples against the death penalty?
(To which there was no response.)
BY THE COURT: Number two?
(To which there was no response.)

(Footnote 1 Continued)

BY THE COURT: Regular panel number one? I think Mrs. Thorne, you indicated earlier - do I understand your earlier response to mean that you do have conscientious scruples against the infliction of the death penalty when the --
JUROR THORNE: -- I do.
BY THE COURT: Can you - since you have answered that you do have scruples, I ask you whether or not you can, nevertheless, follow the testimony of the witnesses and the instructions of the Court as to the law and returning a verdict of guilty, even though a verdict of guilty could potentially result in the death penalty, if you, being a judge of the evidence, are convinced of the guilt of the Defendant and the circumstances warrant such a verdict?
JUROR THORNE: I couldn't do it.
BY THE COURT: O. K., the law
WHEREUPON the Court continued to voir dire the jury panel, when the following transpired:
BY THE COURT: All right, Mrs. Thorne, in view of the responses from some of the other jurors, let me ask you to come forward and have a seat again.
(Mrs. Thorne was returned to the jury panel.)

(Footnote 1 Continued)

BY THE COURT: There appears to be some disagreement as to your response to the Court. We have, as I've indicated, two potential stages to this trial. One in which the jury decides whether or not this man is, in fact, guilty of the crime with which he is charged, which is capital murder. If the jury should find that he is, in fact, guilty of capital murder, a second stage of the trial must be held in which the jury decides whether or not the Defendant should suffer death or life imprisonment. As I understood - let me ask you at this time - you've indicated that you do have conscientious scruples against the death penalty. Would those conscientious scruples prevent you from fairly and objectively considering the evidence in the first stage, in determining whether or not the Defendant is guilty of capital murder?

JUROR THORNE: I think they would. I think my emotions would control my decision. think I could.

BY THE COURT: O. K., I'm satisfied and you will be excused, Mrs. Thorne. Thank you.

(Footnote 1 Continued)

BY MR. MORRIS: Your Honor, with all due respect, I'd like to make the same exception.
BY THE COURT: You may note an objection.

* * *

WHEREUPON the Court continued to voir dire the jury panel, during the course of which, the following transpired:
BY THE COURT: I think we had some other hands on that panel. Mrs. Breaux, I think you --
JUROR BREAUX: -- I don't think I could - I could actually say one way or the other. I wouldn't do any good because I wouldn't be able to make any decision whether he is or isn't guilty.
BY THE COURT: You could not decide whether or not he is guilty?
JUROR BREAUX: No, sir. No, sir.
BY THE COURT: Is that what you are saying because I --
JUROR BREAUX: -- I don't think I could make that decision, whether he is or isn't guilty of what they say he's done.
BY THE COURT: All Right, simply the fact that you, in the second hearing, can determine whether or not the death penalty or life imprisonment would be inflicted would prevent you from

(Footnote 1 Continued)

objectively making the decision in the first hearing, as to guilt?
JUROR BREAUX: I couldn't make it.
BY THE COURT: O. K., the law would require that I excuse you, Mrs. Breaux. Thank you. Were there any other hands on jury number one of the regular panel? I see a rather uncertain hand, Mrs. Hover. Are you scratching your ear or are you raising your hand?
JUROR HOVER: I don't know that I could, either. I mean I just wouldn't want to feel like that, you know, somebody's in prison or - or would be committed to an institution, I mean, because I said yes or no.
BY THE COURT: Well, nobody's here to tell you that the decision in this case won't be a grave and difficult one. I think we all understand that. I think we have to keep the two questions in perspective. The first question, Mrs. Hover, is do you have any conscientious scruples against the infliction of the death penalty?
JUROR HOVER: I don't but I mean, I don't know that I would vote for it. I mean, you know, if somebody else committed somebody else to a sentence, it wouldn't bother me, but I mean, for me to do it, I just have different feelings.

(Footnote 1 Continued)

BY THE COURT: Well, the next question is - keeping in mind the way that you feel, would your feelings prevent you from fairly and objectively determining from the evidence and the law whether or not the Defendant is guilty of capital murder or a lesser crime?
JUROR HOVER: I've got to - I don't think I could do it. I wouldn't want to do it.
BY THE COURT: None of us want to make a grave decision like that but would your feelings prevent you from being fair and to be on it. I mean, you want me to be honest, too, so ...
BY THE COURT: I think it's necessary. We appreciate what you are telling us right now. It's informative but the question that I have to ask you is one that the law requires and I am certain the parties are going to consider what you are telling us right now, but in order for the law - to require me to excuse you, you would have to tell me that you cannot fairly and impartially consider the question of whether or not the Defendant is guilty of capital murder or another crime because you have scruples against the death penalty.
JUROR HOVER: Well, I just - I'd have to say, yes, then. I'd

(Footnote 1 Continued)

have scruples against the punishment.
BY THE COURT: All Right, I'll have to excuse you. Thank you for being candid. Mr. Kornman?
JUROR KORNMAN: I don't believe I could inflict the death penalty, either.
BY THE COURT: I am going to ask you another question. You told me that you cannot inflict the death penalty. Would that fact prevent you from fairly and objectively determining whether or not the Defendant is guilty of capital murder or a lesser crime?
JUROR KORNMAN: Yes, I think it would.
BY THE COURT: You feel like, you, sir. Thank you.
BY MR. MORRIS: Your Honor, I want to - if I may, just have a continuing - for the record - exception, for purposes of what we discussed.
BY THE COURT: All right.

TR. Vol. 1, p. 160-66.

denied his right to a fair and impartial jury under the sixth and fourteenth amendments as construed and applied in Witherspoon v. Illinois, 391 U.S. 510 (1968), by the exclusion of these four veniremen.

Through Witherspoon and its progeny, the Court has established that a juror may not be challenged for cause based upon his general objections to capital punishment. However, a venireman may constitutionally be excluded if: (1) he would automatically vote against the death penalty regardless of the facts adduced at trial; or (2) his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt. Witherspoon v. Illinois, 391 U.S. at 522-23 n.21; Adams v. Texas, 448 U.S. 38 45 (1980). Further, the Witherspoon test is two pronged; there is no requirement that both prongs be met prior to exclusion from a

venire. Williams v. Maggio, 679 F.2d 381, 384 (5th Cir. 1982).

In analyzing the excluded jurors' responses, Juror Thorne stated unequivocally that her scruples against the death penalty would prevent her from objectively considering the question of the defendant's guilt. This response meets the second criteria adduced in Witherspoon and the Court concludes that Juror Thorne was properly excluded.

Likewise, Juror Breaux stated unequivocally that her ability to render a verdict as to guilt would be directly affected by the knowledge that this verdict could result in the imposition of the death penalty. To this end, Juror Breaux was properly excused.

Jurors Hover and Kornman stated that they could not inflict the death penalty. These personal convictions made them ineligible to

serve on a capital jury, and accordingly, they were properly excused.

B. Refusal of Jury's Verdict

During the sentencing phase and after the jury deliberated for over two hours, a note was sent to the court which stated that "We the jury cannot come to a unanimously [sic] decision -- what shall we do?", [2] The judge, in response, stated "Ladies and Gentlemen ... it's been a long day ... and it's getting a little bit late into the night so ... Court is going to recess until 9 tomorrow morning." [3] Jones contends that the judge should have imposed a life sentence pursuant to the provisions of MISS. CODE ANN. § 99-19-103 (Supp. 1982).

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2 TR. Vol. 4, p. 743

3 TR. Vol. 4, p. 741, 742

MISS. CODE ANN. § 99-19-103 (Supp. 1982) states that if the jury cannot agree, within a reasonable time, as to punishment, the judge shall dismiss the jury and impose a life sentence. § 99-19-103, however, authorizes the trial judge to return the jury for further deliberation if he thinks it likely that a verdict may be reached. Sharplin v. State, 330 So.2d 591, 596 (Miss. 1976).

A similar incident occurred in Jordan v. State, 365 So.2d 1198, 1206 (Miss. 1978), when the jury came into court and announced that they could not agree as to punishment. The judge directed that they deliberate further. The Mississippi Supreme Court held that no error had occurred since the jurors had not announced that they could not reach a verdict if given additional time.

In the case sub judice, the jury simply requested further instruction. They did not

indicate that they were hopelessly deadlocked, and the trial court properly used its discretion in recessing for the night after a long day. As the state supreme court concluded, "[w]e do not consider the note to be the equivalent of a verdict and therefore conclude this assignment lacks merit." 381 So.2d at 992.

C. Failure to Instruct on a Lesser Included Offense

At the conclusion of the guilt phase of Jones' trial, the only offense submitted to the jury was that of capital murder. Jones argues that the fourteenth amendment was violated because the jury was not permitted to consider a lesser included offense. The state argues that Jones is barred from raising this issue on habeas due to his failure to contemporaneously request such an instruction.

The Mississippi Supreme Court has explicitly held that "the trial judge shall not be put in error for his failure to instruct on any point of law unless specifically requested in writing to do so." Newell v. State, 308 So.2d 71, 78 (Miss. 1975). However, the Fifth Circuit has interpreted the Mississippi Supreme Court's opinion in Culberson v. State, 379 So.2d 499 (Miss. 1980), cert. denied, 449 U.S. 1103 (1981), as expressly waiving Mississippi Supreme Court Rule 42's contemporaneous objection requirement in capital cases. Bell v. Watkins, No. 81-4358, slip op. at 955 n.5 (5th Cir. Dec. 6, 1982). Therefore, no procedural bar exists which precludes the Court from reviewing the petitioner's claim.

In Beck v. Alabama, 447 U.S. 625 (1980), the Court held that a lesser included offense instruction should be given if the evidence would permit a jury rationally to find the

defendant guilty of the lesser offense and acquit him of the greater. The Court has since emphasized that there is no due process violation unless there is some evidence to murder as a killing "done with or without design to effect death, by any person engaged in the commission of the crime of ... robbery ...." Thus, any murder committed during the course of a robbery is capital murder. Since it was proved by the state that Jones committed a robbery, any murder committed had to be capital. See Bell v. Watkins, No. 81-4358, slip op. at 955-57 (5th Cir. Dec. 6, 1982). Therefore, the trial court's failure to give a lesser included offense instruction was proper.

D. Jones' Death Sentence Is Excessive and Unconstitutional

The petitioner challenges the imposition of the death sentence in his case on the basis

of the recent decision of Enmund v. Florida, 50 U.S.L.W. 5087 (U.S. July 2, 1982).

In Enmund, an aged couple was murdered during the commission of a robbery. Enmund and two others were indicted for the first-degree murder and robbery of the couple. The jury found Enmund and a co-defendant guilty and in the sentencing hearing recommended the death penalty for both defendants. On appeal, the Florida Supreme Court held that the record supported no more than an inference that Enmund was the person driving the getaway car, waiting in the car on the side of the road to help the robbers escape. Under Florida law, this made Enmund a constructive aider and abettor and therefore, a principal in first-degree murder upon whom the death penalty could be imposed. This fact alone supported the verdict of murder in the first-degree under Florida's felony murder statute.

The Supreme Court reasoned that while robbery is a serious crime, it is not a crime "so grievous an affront to humanity that the 'individualized consideration as a constitutional requirement in imposing the death sentence.'" Id. at 5091 (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)). [4] The Court held that the imposition of the death penalty is cruel and unusual punishment under the eighth amendment in the absence of proof that the defendant killed, attempted to kill, or intended to kill.

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[4] The Court noted that of the thirty-six state and federal jurisdictions presently authorizing the death penalty, only nine jurisdictions authorize imposition of the death penalty solely for participation in a robbery in which another robber takes life. Mississippi is one of those nine. See MISS. CODE ANN. §§ 97-3-19(2)(e), 99-19-105(5) (Supp. 1982).

In applying Enmund to the case sub judice, the Court finds that the petitioner's death sentence must be vacated. There is nothing in the verdict of the jury that evidences a finding that Larry Jones killed, attempted to kill, or intended to kill the deceased. The Mississippi Supreme Court recognized this absence and stated:

> Appellant next contends, "The record does not expressly show that this appellant was actively engaged in an assault on the victim in the course of the robbery set out by all the evidence in the indictment alleges that Larry Jones, together with his co-indictees Willie Reddix and J.D. Reddix, participated in an armed robbery which resulted in the death of Arthur Weinburger [sic], a human being. The statutory subsection proscribing appellant's conduct, Mississippi Code Annotated section 97-3-19(2)(e) (1972), appears in the indictment. It designates as capital murder a killing "done with or without any design to effect death, by any person engaged in the commission of the crime of . . . robbery.

> This language renders the factual question of which of two co-felons acted as the efficient cause of the death unnecessary to the verdict in the guilt-determining phase. It is enough that the evidence shows the willing participation of the accused in a robbery in furtherance of which a death resulted. See Price v. State, 362 So.2d 204 (Miss. 1978); McNeer v. State, 228 Miss. 308, 87 So.2d 568 (1956); Carrol v. State, 183 Miss. 1, 183 So. 703 (1938); Woodward v. State, 166 Miss. 596, murder in the absence of proof that he had a specific intention to kill.

Jones v. State, 381 So.2d 983, 989 (Miss. 1980). Further evidencing such an absence is a statement made by Chief Justice Patterson in reference to the prosecutor's statement in closing argument that Arthur Weinberger was hit four times with a wrench, "I think it had the likelihood of leading the jury into the belief that the appellant struck the blows when there is no evidence in this record establishing that fact." 381 So.2d at 999 (Patterson, J., dissenting).

The state argues that Enmund, in effect, establishes a proximity rule and that the factual setting of Enmund fits the role of J. D. Reddix, the driver of the getaway car, and not that of Larry Jones, who was in the store with the other robber. This Court must reject this argument in favor of the conclusion that the issue is intent and not physical proximity.

Therefore, in the in the [sic] absence of a finding by the jury that Larry Jones killed,

attempted to kill, or intended to kill, the Court finds that the sentence of death violates the eighth amendment. [5]

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[5] It is not the intent of this Court that the jury's verdict of guilty to the actual crime of felony murder be set aside. It is this Court's opinion that in order to be convicted of felony murder under § 97-3-19(2)(e), the state need show only that the defendant was guilty of a robbery during which a killing was committed. However, Enmund prohibits the infliction of Enmund are no longer applicable. To this end, only when the state has presented evidence, and the jury has found that the defendant killed, attempted to kill, or intended to kill, may the state inflict the penalty of death.

While the Court is not directing that the Enmund factors be shown during the sentencing phase of the defendant's trial, it seems appropriate for the jury to address these elements during the deliberations relative to aggravating and mitigating circumstances.

E. Ineffective Assistance of Counsel During Sentencing Phase

Jones claims that his counsel was ineffective during the sentencing phase of his trial because no evidence of any mitigating circumstances was presented by his attorney. Jones claims that evidence of his subnormal intelligence should have been presented to the jury in mitigation of his sentence. While the defendant Jones did give a closing statement to the jury, his attorney presented nothing. [6]

In Voyles v. Watkins, 489 F.Supp. 901 (N.D. Miss. 1980), the court was faced with a similar lack of presentation by defense counsel during the sentencing phase of the trial. The court responded:

> As stated, petitioner's trial counsel failed to present any evidence of mitigating

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6 TR. Vol. 4, p. 720.

circumstances, although an array of witnesses to testify in mitigation would have been readily available upon proper investigation. An appeal to spare the petitioner's life could have been forcefully made through diligent efforts of his trial counsel. Instead, the entire defense at sentencing consisted of the following "argument" by counsel:

> The defendant also submits the portion of the trial to you on the record as you now have it. The last instruction that the Court read has various circumstances in it called aggravating and mitigating. It is up to you to take all those, apply them to what you have heard, the testimony that is now in the record and to find whether any of those apply. I suppose the bottom line of this is you have to decide whether the imposition of the penalty of death upon Jimmy Voyles will benefit our society and serve the ends of justice. I think it will not. Thank you. (TR. 57-59).

We are thus faced with a situation where the defense attorney "put on what amounted to no defense at all," thereby making any showing of prejudice unnecessary. See

> Davis v. Alabama, supra, at 1221-22. However, we unhesitatingly believe that this lack of defense, at such a critical stage, due to ineffectiveness of rights to effective assistance of counsel and due process.

Id. at 912.

While effective assistance of counsel is not errorless counsel, counsel must perform services that are reasonably adequate. Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974). Counsel is ineffective "if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir.), vacated as moot, 446 U.S. 903 (1980).

In the present case, the petitioner's attorney offered no evidence in mitigation of the death sentence at the sentencing phase of petitioner's trial. After the prosecution rested, petitioner's attorney simply stated

"The defense rests, your Honor." TR. Vol. 4, p. 720.

Evidence that the petitioner possessed subnormal intelligence was expressed in the testimony of Dr. Gilbert S. MacVaugh, a licensed clinical psychologist and witness on behalf of the petitioner at the hearing on this matter. Dr. MacVaugh testified that he administered the Weschler Adult Intelligence Scale (WAIS) and the results revealed that Jones had a verbal intelligence quotient (IQ) of 49, a performance IQ of 35, and a full scale IQ of 41. Dr. MacVaugh concluded that functionally, Jones was a mild mental retard. [7] during the sentencing phase of the petitioner's trial. The competence of the petitioner at the

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[7] The respondent offered the testimony of Dr. Glen Anderson, director of the forensic unit at the Mississippi State Mental Hospital at Whitfield. Dr. Anderson indicated that Jones

time of the crime was a matter for the jury to consider in reaching a decision on the petitioner's sentence. Accordingly, this factor should have been presented to the jury.

The Court is therefore of the opinion that the sentencing phase of the trial must be set aside as a result of ineffective assistance of counsel. While the state argues that this claim has been waived by lack of exhaustion, the Court finds that sufficient "cause" exists for this Court to excuse the prior lack of presentation. Furthermore, the "prejudice" that flows from this lack of defense is obvious. This Court, however, need not make this determination under the authority of Voyles.

III. CONCLUSION

We therefore conclude that the petitioner is entitled to relief upon his petition for habeas corpus insofar as his sentence of death

is affected. The Court holds that the sentence of death must be vacated due to the following errors of constitutional dimension: (1) imposition of the death sentence in violation of the eighth amendment under standards set forth by Enmund v. Florida [8] and (2)

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[8] The petitioner contends that he is permanently insulated from the imposition of the death penalty by virtue of the Double Jeopardy Clause. He argues that should the Court vacate his sentence on the basis of Enmund, In Tibbs the Supreme Court clarified the issue of when a defendant whose conviction has been reversed may be retried without offending the Double Jeopardy Clause. The Court held that when a reversal is predicated upon the prosecution's failure to produce sufficient evidence to prove its case, i.e., insufficiency of the evidence, the Double Jeopardy Clause bars a retrial. However, where an appellate court sits as

(Footnote 8 Continued)

a "thirteenth juror" and disagrees with the jury's resolution of conflicting evidence, i.e., a reversal based on the weight of the evidence, a retrial is not precluded by the Double Jeopardy Clause. Tibbs v. Florida, 50 U.S.L.W. at 4609-10.

In this case at bar, there is evidence in the record from which a jury could determine the petitioner's individual culpability. There is testimony to the effect that there was blood on a pair of combat boots Jones was wearing, and evidence that Jones was physically present in the business establisment where the murder occurred. This, of course, is necessary to obtain a conviction for felony murder. However, no determination of the weight to be given to such evidence was made by the jury. Under Enmund, this should have been considered.

ineffective assistant of counsel during the sentencing phase of the petitioner's trial. This renders it unnecessary for the Court to pass upon other errors of law asserted by petitioner.

An order in accordance with the opinion of this Court shall be submitted as provided by the local rules. This the 27th day of January, 1983.

DAN M. RUSSELL, JR.

UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF MISSISSIPPI

NO. 50,944

LARRY JONES

V.

STATE OF MISSISSIPPI

EN BANC.

PATTERSON, CHIEF JUSTICE, FOR THE COURT ON THE GUILT-DETERMINING PHASE.

WALKER, J., FOR THE COURT ON THE SENTENCE-DETERMINING PHASE.

Larry Jones appeals from a second conviction of capital murder and sentence of death entered in the Circuit Court of the Second Judicial District of Harrison County.

We reversed Jones' first conviction and death sentence in Jones v. State, 342 So.2d 735 (Miss. 1977), and directed a new trial

following Jackson v. State, 337 So.2d 1242 (Miss. 1976).

THE GUILT PHASE OF TRIAL

The state's case centers upon the testimony of J. D. Reddix, hereinafter J.D., who testified that on the morning of December 2, 1974, his brother Willie Reddix, hereinafter Willie, and Larry Jones persuaded him to drive them to downtown Biloxi. J. D. testified that at the time he had no knowledge of any criminal design of the others. After stopping for gas, J. D. proceeded with Willie and Larry Jones, hereinafter Jones, to downtown Biloxi where he parked his gray Cadillac in the parking lot of a show store. J. D. testified Willie and Jones then left walking in the general direction of Weinburger's store while he remained in the car. J. D. recalled that Jones at the time was wearing a pair of combat boots.

Orvell McGee was in the same downtown area on December 2, 1974. After identifying a photograph of J. D.'s car, he testified that at about 11:15 a.m. he saw one man park the car and two others get out of it and walk in the direction of Weinburger's store. McGee observed that one of the persons leaving the car wore combat boots. Shortly thereafter, he saw them return and noted the person wearing combat boots was carrying a footlocker. He could not identify Jones as one of the two men he saw leave and later return to the car.

Shortly before noon on December 2, 1974, Ray Real, a store manager, observed a man carrying a footlocker away from Weinburger's store. At about this time Preston Sullivan testified he entered the store and found Arthur Weinburger, proprietor, lying in an office doorway amid a pool of blood. A surgeon gave

evidence that Weinburger died later in the day as the result of blows to his head.

J. D. stated that Jones was carrying a footlocker when he returned to the car. A state witness, Lula Mae Bell, aunt of J. D. and Willie, at first testified she could not remember having seen her nephews or Jones in downtown Biloxi on the day of the homicide. However, on direct examination the following day she recanted, admitting that she had "lied" earlier in her testimony, and explained by stating her life had been threatened in the interest of Jones. She then testified that she did see Willie and Jones leave J. D.'s car and walk toward Weinburger's store on the day of the homicide and that Jones was wearing combat boots.

Annie Lee Reddix, mother of Willie and J. D., testified that on December 2, 1974, J. D., Willie and Jones left her house in J. D.'s

car. When they returned, Jones stored the footlocker which he had in her house, changed the combat boots he was wearing to tennis shoes, and later departed, leaving the boots.

On December 3, 1974, pursuant to warrant, detectives searched the house of Annie Lee Reddix. They discovered a footlocker and a pair of combat boots. The footlocker was identified as the one taken from Weinburger's store, and the boots were found to be stained with human blood of an undeterminable type. Lerline Blancq, manager of Weinburger's store, testified that approximately $600 had been taken in the robbery and positively identified the merchandise found in the footlocker as belonging to Weinburger's store.

By his first, second, and sixth assignments of error, Jones raises the sufficiency of the evidence to support the jury's guilty verdict. He argues that only two

witnesses, Lula Mae Bell, an admitted perjurer, and J. D. Reddix, an admitted accomplice, linked him to the crime.

We conclude the state presented circumstantial evidence sufficient to support the jury verdict of guilty. Under our authorities Lula Mae Bell's and J. D. Reddix's testimony is competent.

Lula Mae Bell was presumptively innocent of perjury when she testified and was therefore a competent witness. Isonhood v. State, 274 So.2d 685, 690 (Miss. 1973). As for J. D. Reddix, his status as an accomplice affected the weight, not the competency of his testimony. Thomas v. State, 340 So.2d 1 (Miss. 1976); Black v. State, 336 So.2d 1302 (Miss. 1976); Fleming v. State, 319 So.2d 2223 (Miss. 1975). The jury had before it exhaustive attempts by the defense to impeach these witnesses and by the state to

rehabilitate them. The trial court, in our opinion, properly left to the jury the weight and worth to be accorded their testimony. From the entirety of the record and particularly in view of the corroborating circumstances evidenced by disinterested witnesses, we think that reasonable minds could have found it to have been beyond reasonable doubt that Jones participated in the robbery resulting in Weinburger's death.

As a confessed accessory after the fact to the murder with which Jones was charged, J. D. was an accomplice. Dedeaux v. State, 125 Miss. 326, 87 So. 664 (1921). Therefore, his testimony must be considered with caution. Feranda v. State, 267 So.2d 305 (Miss. 1972). However, it is also established that an accused may be convicted on the uncorroborated testimony of an accomplice. Rich v. State, 322 So.2d 468 (Miss. 1975); Moore v. State, 291

So.2d 187 (Miss. 1974); Young v. State, 212 Miss. 460, 54 So.2d 671 (1951). Moreover, J. D.'s testimony appears consistent with the corroborating testimony to which other witnesses testified.

State witnesses Orvel McGee, Ray Real, Preston Sullivan, Lerline Blancq, and others, together established that at about midday on the day of the homicide, two empty-handed black men, one wearing combat boots, went in the direction of Weinburger's store from J. D.'s parked automobile. Orvel McGee recalled seeing a man wearing combat boots return with a footlocker to the car a few minutes after he left it. Later a footlocker was carried by Jones into Annie Lee Reddix's house, where it was subsequently discovered and identified as stolen from Weinburger's store, and bloodstained boots were also found. In sum, the record contains more than "slight"

corroborative evidence which we held sufficient to sustain the conviction on an accomplice's testimony in Lifer v. State, 189 Miss. 754, 199 So. 107 (1940), and cases cited therein.

On cross-examination of J. D., an inconsistency was established between his current testimony concerning the color of the pants worn by Jones on the day of the homicide and his testimony on the same matter given at a previous hearing. J. D. acknowledged the inconsistency, but offered no explanation. An additional inconsistency was brought out on cross-examination. J. D. had apparently told the Biloxi police that one "Royce" was with them on the day of the homicide, but the evidence was inconclusive as to whether "Royce" or "Roy," [1] as he was later referred to,

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[1] Again referred to in the sentencing phase by Jones in his pro se argument.

accompanied the participants in the crime to the downtown area.

We do not think the cross-examination concerning the color of the pants worn by Larry Jones and the company of Ray destroyed J. D.'s testimony as a matter of law. The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and sincerity. The entire sequence of examination suggests that while Roy may have been "with them" sometime on December 2, 1974, he did not accompany the criminal participants to downtown Biloxi. Under the circumstances, we think leaving the question of credibility to the jury was proper and that appellant's conviction cannot be said to be contrary to the weight of the evidence. See Kinney v. State, 336 So.2d 493 (Miss. 1976); Black v. State, 336 So.2d 1302 (Miss. 1976); Fleming v. State, 319 So.2d

223 (Miss. 1975); Null v. State, 311 So.2d 654 (Miss. 1975).

Appellant next contends, "The record does not expressly show that this appellant was actively engaged in an assault on the victim in the course of the robbery set out by all the evidence in the record." We agree the record does not conclusively establish which of the two co-felons, Willie Reddix or Larry Jones, the appellant, actually wielded the blows causing Weinburger's death. However, doubt concerning the precise role of the appellant in the homicide does not upset the jury's verdict. The indictment alleges that Larry Jones, together with his co-indictees Willie Reddix and J. D. Reddix, participated in an armed robbery which resulted in the death of Arthur Weinburger, a human being. The statutory subsection proscribing appellant's conduct, Mississippi Code Annotated section

97-3-19(2)(e) (1972), appears in the indictment. It designates as capital murder a killing "done with or without any design to effect death, by any person engaged in the commission of the crime of . . . robbery . . . ."

This language renders the factual question of which of two co-felons acted as the efficient cause of the death unnecessary to the verdict in the guilt-determining phase. It is enough that the evidence shows the willing participation of the accused in a robbery in furtherance of which a death resulted. See Price v. State, 362 So.2d 204 (Miss. 1978); McNeer v. State, 228 Miss. 308, 87 So.2d 568 (1956); Carrol v. State, 183 Miss. 1, 183 So. 703 (1938); Woodward v. State, 166 Miss. 596, 143 So. 859 (1932); Fisher v. State, 150 Miss. 206, 116 So. 746 (1928); cf. Miss. Code Ann. § 97-1-3 (1972).

As we have said, the evidence sufficiently demonstrates such a willing participation by the appellant. He does not challenge the indictment, nor suggest the legislature lacks the power to expose him to guilt of capital murder in the absence of proof that he had a specific intention to kill. We conclude that the verdict in the guilt-determining phase is within the law and the weight of the evidence.

Appellant next contends the cumulative effect of trial errors consisting of unduly constrained voir dire examination, unduly restricted defense argument and improper prosecutorial remarks requires reversal.

The trial court has broad discretion in passing upon the extent and propriety of questions addressed to prospective jurors. Myers v. State, 268 So.2d 353 (Miss. 1972). Although broad, the discretion is not unlimited, and an abuse will be found on appeal

where clear prejudice to the accused results from undue constraint on the defense or undue lack of constraint on the prosecution. See, e.g., McCaskill v. State, 227 So.2d 847 (Miss. 1969), Leverett v. State, 112 Miss. 394, 73 So. 273 (1916).

Appellant complains that the trial court did not permit him to inquire of the prospective jurors whether they would be happy to be tried by persons in their frame of mind. Yet our review reveals the trial court, for whatever reason, did permit this questioning. Further, appellant suggests he was not permitted to ask the prospective jurors whether they would follow the law. Again, the record does not support the suggestion, and we must conclude neither contention has merit.

Appellant next argues that undue restraint was imposed upon defense counsel when he attempted to ask the prospective jurors whether

they would consider the indictment as anything but a "mere piece of paper" in considering their verdict. At this point the court advised defense counsel that he would instruct on this point and the record reveals that he did so at the appropriate time.

A review of the objections which were sustained to defense counsel's closing summation in the guilt-determining phase reveals no error, in our opinion. The court properly sustained an objection to defense counsel's attempt to place the individual jurors in the non-neutral position of the accused. See Danner v. Mid-State Paving Co., 252 Miss. 776, 173 So.2d 608 (1965).

The state also objected to defense counsel's statement, "[b]ear with me also because the state is going to try to confuse me as much as they can . . .." The court sustained the objection to this argument and we

think properly so. Later in defense counsel's argument, the court sustained an objection raised when counsel suggested to the jury that one of the state's witnesses had been granted immunity from perjury. Again, the trial court's ruling appears to have been correct, because there is no suggestion in the record that there had been a grant of immunity. One well established constraint upon the permissible perimeters of closing argument is that counsel must limit his remarks to the evidence presented. See Gray v. State, 351 So.2d 1342 (Miss. 1977); Nelms and Blums v. Fink, 159 Miss. 372, 131 So. 817 (1930).

Appellant next contends that the cumulative effect of objectionable statements made by the state vitiated his trial with prejudicial error. Appellant's complain concerns testimony and statements which touched upon the unpleasant details of Weinburger's

death. Again, reviewing the record, we find the trial court sustained defense counsel's objections to any detail relating to the physical aspects of the death when questioning exceeded that necessary to establish the fact and cause of death. For example, the trial court refused to admit pictures of the deceased during the guilt phase and instructed the jury to disregard the state's dim suggestions that the killing was particularly atrocious.

Appellant also complains that the jury learned of Willie Reddix's conviction in a separate trial. It is true that we have held admission of evidence of this nature to be inimical to a fair trial. Ivy v. State, 301 So.2d 292 (Miss. 1974); McCray v. State, 293 So.2d 807 (Miss. 1974); Buckley v. State, 223 So.2d 524 (Miss. 1969); State v. Thornhill, 251 Miss. 718, 171 So.2d 308 (1965). However, we find that defense counsel underscored Willie

Reddix's conviction and attempted to use that fact to appellant's advantage, as can be seen from the following colloquy between defense counsel and state witness Annie Lee Reddix:

> Q. You do have a real good motive in shifting the blame in this case from your son J. D. to Larry Jones haven't you?
>
> * * * *
>
> A. I don't know the reason you are talking about.
>
> Q. Well, J. D. is your son, isn't he?
>
> A. Yes, he's my son.
>
> Q. J. D. was charged with capital murder, wasn't he?
>
> A. All three of them was charged with capital murder.
>
> Q. That's right, and Willie's been convicted hasn't he?
>
> A. Yes.
>
> Q. And sent to the gas chamber.
>
> A. Yes.

Also, defense counsel while cross-examining J. D. Reddix, elicited the following testimony:

> Q. Were you or were you not a codefendant in this case in the beginning?
>
> A. Would you -- what --
>
> Q. -- Weren't you charged and indicted for the crime of capital murder?
>
> A. Yes, I was.

We think an appellant cannot assail as prejudicial his own trial tactics, because it would foster a propensity in litigants to create error to enhance the possibility of reversal and repeated trials. This he is not permitted to do. Simpson v. State, 366 So.2d 1085 (Miss. 1979).

Appellant then argues his motion for a mistrial was improperly denied, because

irreparable prejudice resulted from the following:

> BY MR. NECAISE: And then finding this Defendant along with the co-defendant, Willie Reddix, in Jackson County four days later and this Defendant doing --
>
> BY MR. MORRIS: -- objection, Your Honor. There is no evidence whatsoever before this Court that this Defendant was found with Willie Reddix.
>
> BY THE COURT: Objection sustained.

The court's ruling sufficed to repair any prejudice which might otherwise have resulted. It negated, we think, any suggestion of guilt by association.

In conclusion, we are of the opinion that when considered either alone or in combination, appellant's third, fourth, and twelfth assignments of error do not merit reversal of the verdict rendered in the guilt-determining phase.

By his seventh assignment of error, Jones contends the court erred in refusing Instructions D-4, D-5, D-8, D-9, D-10, D-12, D-16, D-17, D-18 and D-19. We have studiously reviewed these instructions and are of the opinion they are in all essential respects cumulative with others which were granted. The trial court is not required to grant several instructions on the same question in a different verbiage. McMillon v. State, 198 Miss. 179, 21 So.2d 586 (1945). When we consider all of the instructions together, we conclude the jury was properly instructed upon the law of the case.

Instruction D-17 concerns the weight to be accorded the testimony of an accomplice. While it would not be improper to grant an instruction of this nature, Dedeaux v. State, 125 Miss. 326, 87 So. 664 (1921), the decision to grant or refuse it

rests within the sound discretion of the trial court. Ragan v. State, 318 So.2d 879 (Miss. 1975); Wellborn v. State, 140 Miss. 640, 105 So. 769 (1925). Moreover, the instruction refers to "the unsupported testimony of an alleged codefendant." This suggests the testimony of the accomplice was unsupported by other evidence when in fact it was corroborated. We therefore think refusal of Instruction D-17 does not constitute reversible error.

Our review of the record reveals no prejudicial error. We therefore affirm the verdict of guilty.

AFFIRMED.
ALL JUSTICES CONCUR.

THE SENTENCING PHASE OF TRIAL

WALKER, J., FOR THE COURT:

The appellant contends there was error in dismissing jurors who were opposed to the death penalty. The relevant portions of the voir dire examination lead us to conclude this assignment has no merit.

On appellant's appeal from his first conviction of capital murder, this Court in directing a retrial in accord with Jackson, supra, stated: "On retrial, if defendant is tried on a capital charge, the trial court will follow Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)." 342 So.2d at 737. The lower court complied with this directive by eliminating for cause those jurors who not only indicated they harbored conscientious scruples against the death penaity, but who also indicated those scruples

would prevent them from trying the issue of guilt in accord with their oath. Those who harbored conscientious scruples but who signified they could follow the law and fairly try the case were retained as prospective jurors. This complied with Witherspoon, supra. See also Spinkellink v. Wainwright, 578 F.2d 582, 592-93 (5th Cir. 1978).

Appellant next contends the death penalty statute, Mississippi Code Annotated section 99-19-101 (Supp. 1978), is unconstitutionally vague. He argues that no valid death penalty statute existed in this state at the time of the crime. We have rejected identical contentions in earlier opinions and think it unnecessary to reiterate the discussions contained in them. See Washington v. State, 361 So.2d 61 (Miss. 1978); Irving v. State, 361 So.2d 1360 (Miss. 1978); Bell v. State, 353

So.2d 1141 (Miss. 1977); and Jackson v. State, 337 So.2d 1242 (Miss. 1976).

Jones next arques there was error in Instruction C-30 concerning the form of the verdict. The alleged defect in the instruction consists of the omission of a statement informing the jurors in the event of their inability to reach a unanimous verdict a life sentence would be imposed. We note that Rule 5.13 of the Mississippi Uniform Criminal Rules of Circuit Court Practice provides for such a statement in the sentencing phase of a capital case, however, the omission has not been held reversible error. We have held only that "[i]f the jury is unable to agree unanimously on a verdict at the sentencing hearing, the defendant shall be sentenced to life in prison." Jackson v. State, 337 So.2d 1242, 1256 (Miss. 1976).

We do not find an instruction requested by appellant concerning the form of the verdict. But assuming, arguendo, that appellant preserved for review the issue raised by his eighth assignment of error, see McMullen v. State, 291 So.2d 537 (Miss. 1974), we are of the opinion that the omission does not constitute reversible error, because the jury did reach a unanimous verdict within a reasonable time.

This brings us to the argument that a life sentence should have been entered when the jury after deliberating for two hours and fifteen minutes, returned to the courtroom at 9:15 p.m. with a note, signed by the foreman, reading, "[w]e the jury cannot come to a unanimously [sic] decision--what shall we do?" The construction of this note becomes, as appellant suggests, crucial under Jackson, supra. If interpreted as a statement by the

jurors that they could not within a reasonable time reach unanimity, the death sentence imposed the following day is in jeopardy. If, however, it is construed as a statement by the jurors that they were weary and desired a recess, the death sentence eventually imposed is valid, subject only to judicial review pursuant to Mississippi Code Annotated section 99-19-105 (Supp. 1978).

When the note was received the trial judge stated: "Ladies and gentlemen of the jury, it's been a long day. You started work this morning at about nine and it's getting a little bit late into the night so at this time, court is going to recess until nine tomorrow morning." In so stating, he complied with this Court's decisions concerning the procedure to be followed when the jury indicates its present inability to reach a unanimous verdict. See, e.g., Jordan v. State, 365 So.2d

1198, 1206 (Miss. 1978), and cases cited therein. We do not consider the note to be the equivalent of a verdict and therefore conclude this assignment lacks merit.

Some of the Justices have expressed concern about remarks made by the prosecuting attorney during final arguments in the sentencing phase. These remarks were in response to statements, not supported by the record, made by the defendant while exercising his right to argue his case to the jury, and the district attorney's remarks alluded to the failure of the defendant to testify.

FOR CLARITY, SEE THE PARTS OF THE RECORD DEALING WITH THESE REMARKS ATTACHED HERETO AS APPENDIX "A."

We do not find any prejudicial error stemming from the prosecutor's remarks. The remarks were prompted by the defendant's own statements which were exculpatory and

self-serving in nature, not under oath and not supported by the record.

Mississippi Constitution, Article 3, Section 26 (1890) guarantees the accused the right to argue his case to the jury. Gray v. State, 351 So.2d 1342 (Miss. 1977). In addition, the accused in a criminal trial has the right not to testify. That right is so basic to the American concept of a fair trial that a prosecutorial comment on an accused's failure to testify is a violation of the self-incrimination clause of the Fifth Amendment. Griffin v. California, 300 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

These two rights create a conflict which requires a defendant to make a choice. If he chooses to argue his case to the jury and at the same time invokes the Fifth Amendment, he must confine his remarks to the evidence in the record. The Fifth Amendment privilege against

self-incrimination is a shield, not a sword. A criminal defendant who takes advantage of his right to argue his case to the jury must not be permitted to say all the things he might have testified to had he chosen to call himself as a witness. When he does so, he will be deemed to have waived the right not to have his failure to take the stand commented upon.

There is no doubt that an individual may waive the personal protections and privileges provided by the United States Constitution, Morgan v. United States Fidelity & Guaranty Co., 222 So.2d 820 (Miss. 1969). See also Brewer v. State, 233 So.2d 779 (Miss. 1970) [right of confrontation]; Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461, 146 A.L.R. 357 (1937) [Sixth Amendment]; Zap v. United States, 328 U.S. 624, 66 S.Ct. 1277, 90 L.Ed. 1477 (1946) [Fourth and Fifth Amendments].

This Court has specifically recognized that an accused can waive his immunity from self-incrimination, and that he does so when he takes the stand and testifies on the merits of the case. See Autry v. State, 230 Miss. 421, 92 So.2d 856 (1957). We are of the opinion that he does the same when he goes beyond the record when arguing his case and gives testimony on a material point which is not in the record.

The practical solution to the dilemma presented by the accused who uses his constitutional right to argue his case to the jury to give, what is for all practical purposes, testimony is to treat the unsworn testimonial statements of the accused which were not supported by the record as a partial waiver of the privilege against self-incrimination. It is not a total waiver of the privilege, since the prosecution is

unable to cross-examine the accused at this late stage of the trial. But the prosecution may comment to the jury that the defendant's statements were not given under oath and that he was not subject to cross-examination about them. The constitutional privilege of the criminal defendant appearing pro se is adequately protected if the court gives him a clear and direct warning out of the presence of the jury prior to beginning his argument that such limited comment might follow if he goes outside the record and gives what amounts to unsworn testimony.

The Mississippi Constitution gives the accused the right to be heard by himself or counsel, or both. However, it does not exempt a defendant who argues pro se from following the rules of court procedure. We do note, however, that the trial court should allow him some leeway in arguing his case, each case

necessarily resting on its own facts and circumstances.

But, in those instances where a defendant, arguing pro se, clearly goes beyond the evidence in the record on a material point, as he did in this case, he must accept as a consequence the prosecution's comment on his failure to swear to the testimony. The defendant's remarks in this case cannot be dismissed as a failure to grasp "legal niceties." They are unsworn testimony, and as such, constitute a partial waiver of the constitutional privilege against self-incrimination and the prohibition against a district attorney from commenting on his not taking the stand.

We do not say that every defendant who argues pro se loses the privilege against prosecutorial comment on his failure to testify. Only when the defendant's remarks go

beyond the evidence does he waive this privilege.

The appellant also contends the following statement by the district attorney in his closing argument constituted prejudicial error:

> To come up behind an old man in the twilight years of life and hit him four times, as he told you, with a wrench. We finally found out what it was--with a wrench. That's what he told you when he got up here.

Even though an objection to this statement was sustained, the appellant contends that its effect was not erased from the minds of the jurors. Assuming this is true, we are not convinced the statement was prejudicial. The facts showed that the decedent was struck with a blunt instrument. We see no prejudice resulting from naming the instrument for what it was, be it a wrench or an iron pipe. The fact remains that decedent's death resulted from the blow. The jury was properly

instructed to consider only the evidence in the record, and we cannot agree that any prejudice resulted since the objection to the statement was sustained.

Another problem which deserves comment arose in the sentencing phase. The lower court admitted evidence of an armed robbery conviction of the appellant entered after the December 2, 1974, murder of Weinburger. This conviction was affirmed on appeal in a per curiam opinion. Jones v. State, 340 So.2d 17 (Miss. 1976).

Among the aggravating circumstances available for consideration in capital cases under Mississippi Code Annotated section 99-19-101 (Supp. 1979), subsection (5)(b) is that: "The defendant was <u>previously</u> convicted of another capital offense or of a felony involving the use or threat of violence to the person." (Emphasis added). In employing the

word "previously," the statute designates no time frame. The question arises as to whether the legislature meant previous to the commission of the capital offense or previous to the trial for it.

We conclude the legislature intended to relate the word "previously" to the time of trial, so that a conviction between the time the capital offense was committed and the time of trial for it may be admitted into evidence as an aggravating circumstance. We think this, because a wide leeway is permitted the appellant to offer mitigating circumstances in avoidance of the death sentence, while an extremely limited type of behavior may be offered by the state in seeking capital punishment. In our opinion, the legislature undoubtedly intended a weighing of both at the time of sentencing so the past behavioral patterns likely to affect the defendant's

future behavior might be evaluated by the jury in deciding whether the defendant will live or die. We think there is no more justification for terminating consideration of the defendant's criminal behavior at the time of the offense than there is for terminating consideration of favorable behavior at that time. All go to the question of whether the most severe punishment will serve a legitimate social purpose untainted by vindictiveness.

The aggravating circumstances introduced into evidence and appearing in the jury's verdict are:

> (1) The offense was committed during the commission of robbery.
>
> (2) The offense was especially heinous, atrocious or cruel.
>
> (3) Defendant has been previously convicted of a felony involving the use or threat of violence to the person.

The first was established by the first phase of trial which culminated in a guilty verdict. The second was proved by pictures illustrating the atrociousness of the killing, together with testimony showing the victim to have been old and weak in comparison with appellant. The third was established by the introduction of court records concerning the prior armed robbery conviction.

The defendant introduced no evidence of mitigating circumstances at the sentencing phase. However, there is evidence that the defendant's age was either seventeen or eighteen years at the time of the crime. Also, a mitigating circumstance mandated by Mississippi Code Annotated section 99-19-101(6)(d), relates to the role of the defendant in the crime. In this regard, there was no testimony indicating that this defendant was the one who struck the blows causing death

even though blood was found on his boots. The jury was obviously aware of these circumstances and was instructed to consider any facts concerning the crime or the defendant's background which would reasonably mitigate against imposition of the death penalty. The jury nevertheless found unanimously from the evidence beyond a reasonable doubt that after weighing the mitigating circumstances and the aggravating circumstances, one against the other, the mitigating circumstances did not outweigh the aggravating circumstances, and the defendant should suffer the penalty of death.

Mississippi Code Annotated section 99-19-105 (Supp. 1979), in pertinent part, mandates the following:

* * * *

> (2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99-19-101; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

* * * *

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentence, shall be authorized to:

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if

> taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

In response to subsection (3)(a), the Court is of the opinion that the sentence of death was not imposed under the influence of passion or prejudice.

In response to subsection (3)(b), the Court is of the opinion that the evidence does support the jury's finding of the statutory aggravating circumstances as enumerated in section 99-19-101 and recited in the verdict.

In response to subsection (3)(c), the Court is of the opinion that the sentence of death is not excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In complying with subsection (5), we have reviewed the following capital cases in which

we have rendered dispositive decisions affirming death sentences and setting dates for executions: Culberson v. State, No. 50,802, decided November 28, 1979, and not yet reported; Gray v. State, 375 So.2d 994 (Miss. 1979); Jordan v. State, 365 So.2d 1198 (Miss. 1979); Voyles v. State, 362 So.2d 1236 (Miss. 1978); Irving v. State, 361 So.2d 1360 (Miss. 1978); Washington v. State, 361 So.2d 63 (Miss. 1978); and Bell v. State, 360 So.2d 1206 (Miss. 1978).

SYNOPSES OF THE ABOVE CASES

Bell was an armed robbery case where the robbery has been successfully completed and the killing afterward was wanton, useless and utterly unnecessary. Although at trial Bell denied having actually fired the fatal shot, there was competent evidence that showed he was armed and present when the execution-style

killing occurred. The jury found as an aggravating circumstance that Bell had committed the murder and the murder had occurred during the commission of armed robbery and kidnapping.

The following circumstances in mitigation were before the jury:

> (1) On the night of the murder Bell had been taking marijuana and other drugs;
>
> (2) Bell was either seventeen or eighteen years of age;
>
> (3) According to Bell's testimony, he was an accomplice only and had asked another not to kill the victim at one time.

In Voyles, a thirty-year-old defendant killed his girl fried because she refused to put title to her car in his name. He beat her into unconsciousness, ran over her with a car, and threw her body into a creek. Relying essentially on the testimony of defendant's

nephew, an eyewitness who claimed innocence, the jury found him guilty of capital murder and imposed a death sentence. Aggravating circumstances included the cruelty and atrocity of the killing, that the offense was committed for pecuniary gain, and that it was committed during the course of an attempt to commit robbery. There was no mitigating circumstances submitted to the jury.

In Culberson, the same three aggravating circumstances were present as are present in this case. A mitigating circumstance was that the death sentence rested solely on the testimony of the admitted accomplice, who had plea-bargained for a lesser sentence. In affirming the sentence of death, we implicitly held that the testimony of an admitted accomplice in a capital murder case sufficient to sustain a conviction in the guilt phase of

the trial, is sufficient to sustain the death penalty in the sentencing phase.

The proof in this case sufficiently demonstrates that the defendant was an active and willing participant in a robbery in furtherance of which a death resulted. Although there was no direct testimony that Jones struck the fatal blow, the blood on his boots, coupled with the testimony of several witnesses who placed Jones near the scene of the crime, is strong evidence that he was at least present when the fatal beating took place. The doubt concerning Jones' precise role in the homicide does not upset the jury's sentence of death under these circumstances.

Compared to the other capital cases in which we have affirmed the death sentence, this killing was equally as wanton, cruel and senseless as the others. The defendant was actively engaged in a robbery during the course

of which the victim, a merchant over seventy years of age, was brutally murdered by blows to the head which crushed his skull.

The present case was heard by the full Court, sitting en banc, and carefully reviewed in the manner set forth in Bell, supra, and that prescribed by Mississippi Code Annotated section 99-19-105(3) (Supp. 1978).

We find that: the sentence of death was not imposed in this case under the influence of passion, prejudice or any other arbitrary factor; that the evidence supports the jury's finding of statutory aggravating circumstances; and, having considered both the crime and the defendant, we find that the sentence of death in this case is not excessive or disproportionate to similar cases in which such sentence has been imposed. The decision in the present case is consistent with conclusions

reached in other cases before this Court in which the death penalty has been imposed.

Jones' conviction of capital murder and the sentence of death imposed upon him will be affirmed.

AFFIRMED AND WEDNESDAY, MARCH 12, 1980 IS SET AS THE DATE OF EXECUTION OF THE DEATH SENTENCE.

ALL JUSTICES CONCUR IN THE GUILT-DETERMINING PHASE: WALKER, J., ROBERTSON, P.J., SUGG, LEE AND BOWLING JJ., CONCUR IN THE SENTENCE-DETERMINING PHASE; PATTERSON, C.J., SMITH, P.J., BROOM AND COFER, JJ., DISSENT.

APPENDIX "A"

LARRY JONES' PRO SE ARGUMENT TO JURY
DURING SENTENCING PHASE OF THE
BIFURCATED TRIAL

* * *

THE JURY WAS THEREUPON RETURNED TO THE COURTROOM AND THE COURT HAVING FIRST INSTRUCTED THE JURY, MR. THOMAS PRESENTED OPENING ARGUMENT TO THE JURY ON BEHALF OF THE STATE OF MISSISSIPPI, AT THE CONCLUSION OF WHICH, THE DEFENDANT PROCEEDED WITH FINAL ARGUMENT TO THE JURY, DURING THE COURSE OF WHICH THE FOLLOWING OBJECTION WAS MADE:

THE DEFENDANT: Ladies and gentlemen, my name is Larry Jones and since I see that y'all is confused about what happened and you know, none of y'all know the real facts, which I don't either, and there was more than three peoples involved - there was four involved in the --

BY MR. NECAISE: -- if the Court please, now, we object to that.

B. THE COURT: On what grounds, counsel?

BY MR. NECAISE: On the grounds that he is testifying, if the Court please, and there's no way we can cross examine him on that. He's

saying there were four people involved. There's no testimony to that, Judge, and no way we can cross examine him on that. Now, he can make a plea to the jury but not something that is not in the record.

BY THE COURT: Well, as to the limited statement, I am going to overrule the objection.

* * *

THE DEFENDANT CONTINUED WITH FINAL ARGUMENT TO THE JURY WHEN ANOTHER OBJECTION WAS MADE BY MR. NECAISE:

THE DEFENDANT: We got uptown. He knowed about it. I'm the only one didn't have no idea of what was happening because they had planned way before I ever thought - you know, they planned it when they got short of money --

BY MR. NECAISE: -- if the Court please, we are going to object to this.

BY THE COURT: On what grounds?

BY MR. NECAISE: On the same grounds - this is not testimony - this is not in the record.

BY THE COURT: Well, that's what he's arguing, counsel. He's entitled to make argument and draw inferences from the testimony in the record and I --

BY MR. NECAISE: -- Judge, it's not in the record.

BY THE COURT: -- don't know that he's exceeded that yet.

* * *

THE DEFENDANT PROCEEDED WITH FINAL ARGUMENT TO THE JURY AND ANOTHER OBJECTION WAS MADE BY MR. NECAISE:

THE DEFENDANT: Just as I was coming back, I seen Roy coming out with this suitcase and Willie running the opposite way - I don't know which way it was - I think it was back this way, which is --

BY MR. NECAISE: -- if the Court please, now, that is testifying as to what he saw coming out. That's not drawing any inference. That's testifying and there's no way to contradict that and it's not fair, Judge, if he doesn't taken the stand and let the State cross examine him on this but to stand up here and be able to do something that the State does not have a right to cross examine him on is not proper and that is certainly outside of the record, Judge. There's nothing in the record that Roy was the one that came outside and that Roy was the one that had on the boots. There's no testimony to that. It's uncontradicted until he got up here to make what he's calling a final argument and what he's doing is testifying. The State didn't have a right to call him, Judge. We couldn't put him on the stand.

BY THE COURT: The same rule applies, counsel, to the Defendant at this time as far as the statement he makes here is not testimony and is not evidence. It's merely argument and the jury should consider only the evidence in the course of their deliberation.

BY MR. THOMAS: Judge, we are restricted to arguing based upon the evidence. He's putting testimony or trying to put it in a backdoor approach before a jury.

BY MR. MORRIS: Your Honor, I am going to take issue to that statement and ask that the jury disregard that remark.

BY THE COURT: Sustained, at least to the last remark about a backdoor approach.

* * *

THE DEFENDANT CONTINUED WITH FINAL ARGUMENT TO THE JURY WHEN ANOTHER OBJECTION WAS MADE:

THE DEFENDANT: During that time, when all this was happening, I was around eighteen and I don't know where or what they --

BY MR. NECAISE: -- if the Court please, now, there is no testimony to that. Now, this is - now, Judge, there is no testimony to that.

BY MR. MORRIS: There is testimony to his age, Your Honor.

BY MR. NECAISE: Judge, there is no --

BY MR. MORRIS: -- from J. D. Reddix. I challenge the record on that.

BY THE COURT: What did Reddix Testify?

BY MR. MORRIS: J. D. Reddix testified that he was twenty at the time of the crime and he is now twenty-three and that the Catfish - his words exactly: Catfish was eighteen years old.

BY THE COURT: Objection overruled.

* * *

FINAL ARGUMENT WAS CONCLUDED BY THE DEFENDANT IN HIS OWN BEHALF AND MR. MORRIS PROCEEDED WITH FINAL ARGUMENT TO THE JURY ON BEHALF OF THE DEFENDANT.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 50,944

LARRY JONES

V.

STATE OF MISSISSIPPI

PATTERSON, CHIEF JUSTICE, DISSENTING:

I concur with the majority in the procedure established for pro se arguments on the sentencing phase of a capital case, but would apply it prospectively as was done in Jackson v. State, 337 So.2d 1242 (Miss. 1976). [1]

---

[1] We have discussed the practicality of remanding this case to the trial court for the purpose of determining sentence only, but we are of the opinion that justice demands that the persons convicted and sentenced to death prior to our holding today should have the benefit of all the guidelines outlined herein. (337 So.2d at 1257)

I dissent from the imposition of the death sentence, because the appellant was only seventeen years of age at the time of the homicide and appears to have a borderline mental capacity. While it is true that neither his age or mental capacity was formally introduced into evidence on the sentencing phase, I nevertheless think we are compelled to consider these items on review because such were included with the report prepared by the trial judge as commanded by Mississippi Code Annotated section 99-19-195 (Supp. 1979), and both age and mental capacity are specified in Section 99-19-101(6) concerning mitigating circumstances.

I have no desire to quibble regarding the precise reaction of the jury to the prosecutor's statement, "To come up behind an old man in the twilight years of life and hit him four time, as he told you, with a wrench.

We finally found out what it was-- with a wrench. That's what he told you when he got up here." I think it had the likelihood of leading the jury into the belief that the appellant struck the blows when there is no evidence in this record establishing that fact. Section 99-19-105(2)(a) mandates our consideration of punishment. Subsection (3) directs our attention to determining "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor." I cannot state categorically whether the quoted words did or did not prejudice the jury, but I do think they had that propensity.

I would remand for another jury to determine the punishment, giving consideration to the defendant's age and mental capacity. This would also afford the opportunity for both the appellant and the state to give application

to the new rules concerning pro se argument if this prerogative is again indulged by the appellant.

SMITH, P.J., BROOM AND COFER, JJ., JOIN IN THIS DISSENT.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

NO. 84-1237

MORRIS L. THIGPEN, COMMISSIONER, ET AL.,

Respondents-Appellants
Cross-Appellees,

VERSUS

LARRY JONES,

Petitioner-Appellee
Cross-Appellant

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Larry Jones, who is now held in the Mississippi State Correctional Institute at Parchman, Mississippi, asks leave to file the attached Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The District Court gave Larry Jones permission to proceed in forma pauperis March 9, 1981, and appointed counsel under the Criminal Justice Act of 1964 by order dated February 9, 1982.

DATED: This, the 17th day of May, 1985.

T.H. FREELAND, III

ATTORNEY FOR LARRY JONES

OF COUNSEL:

FREELAND AND FREELAND
1013 Jackson Avenue
Post Office Box 269
Oxford, Mississippi 38655

CERTIFICATE OF SERVICE

I, T.H. FREELAND, III, counsel of record for respondent, certify that I have this day caused to be mailed via the United States Postal Service, first class postage prepaid, a true and correct copy of the foregoing Motion for Leave to Proceed In Forma Pauperis to the following:

William S. Boyd, III, Esquire
White & Morse
Suite 1209 - One Hancock Plaza
Gulfport, Mississippi 39502

This, the 17th day of May, 1985.

T.H. FREELAND, III

NO. 84-1237

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

MORRIS L. THIGPEN, COMMISSIONER, ET AL.,
Respondents-Appellants
Cross-Appellees,

VERSUS

LARRY JONES,
Petitioner-Appellee
Cross-Appellant

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals misconstrue this court's ruling in Enmund by barring the death penalty in absence of proof the respondent killed, attempted to kill, or intended to kill?

2. Did the court of appeals err in applying Enmund retroactively?

3. Did the court of appeals err in failing to find claims of ineffective assistance of counsel and failure to give a lesser included offense instruction were procedurally barred?

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In re Winship, 397 U.S. 358 (1970).....4

STATUTES

Miss. Code Ann. § 99-19-101(7).....1

STATEMENT OF THE CASE

The statement of facts in the petition for certiorari at 4-8 accurately states the facts in this case.

SUMMARY OF THE ARGUMENT

This is not a suitable case for certiorari. The primary issue presented--whether the lower court correctly found insufficient evidence that Larry Jones killed, intended to kill, or attempted to kill--involves nothing more than an examination of the facts in this individual record. It can therefore have no significance beyond the immediate parties. Furthermore, an examination of the record will show that the lower court was correct.

The second issue presented--whether Enmund should be retroactively applied--was referred to as "patently frivolous" in the circuit court of appeals. The question as briefed by the petitioner is whether the petitioner should get another opportunity to prove individual culpability against Larry Jones because the petitioner was somehow "surprised" by this court's decision in Enmund v. Florida, 458 U.S. 782 (1981). There is no conflict of the circuits on this issue, and the question is limited essentially to this particular case. Furthermore, as the petitioner has argued successfully in other cases, Enmund was predictable and therefore could not have been a "surprise" to the petitioner.

The third issue presented, involving procedural bar, is not urged as a genuine issue. The petitioner admits to have raised it for preservation purposes only.

INTRODUCTION

Larry Jones was convicted of capital murder and sentenced to death in December of 1977. At the trial, the state proved that Jones and another individual had been involved in the robbery of a dry goods store. During the robbery, the proprietor of the store was killed. There was neither proof of which of the two killed the proprietor, nor proof of any plan or joint project to kill the proprietor. The state thus failed altogether to prove that Larry Jones killed, intended to kill, or attempted to kill. For that reason, the Fifth Circuit held that a death sentence was barred under Enmund v. Florida, 458 U.S. 782 (1981). Jones v. Thigpen, 741 F.2d 805, 812-13 (5th Cir. 1984).

This case involves a complete absence of proof of individual culpability. It thus does not present the issue on which this Court recently granted certiorari in Cabana v. Bullock, 53 L.W. 3757 (U.S. April 22, 1985) (No. 84-1236). In Bullock, there was sufficient evidence to raise a jury question regarding individual culpability, but the issue had not been submitted to the jury through instructions because Bullock was tried before Enmund was decided. The Fifth Circuit in both Bullock and Reddix v. Thigpen, 728 F.2d 705, 710-11 (5th Cir. 1984), has held that Enmund must be submitted to the jury through proper instructions in jury question cases.[1] The Eleventh Circuit apparently

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[1] A jury finding of individual culpability is now required by statute in Mississippi. The current death penalty statute requires the jury to make a written finding the defendant either "actually killed," "attempted to kill," "intended tht a killing take place," or "contemplated lethal force would be employed." Miss. Code Ann. § 99-19-101(7) (Supp. 1983).

disagrees, thus creating a conflict of the circuits for Bullock.

This conflict is irrelevant to Larry Jones' case. As the Fifth Circuit recognized, there was no evidence that Larry Jones killed, attempted to kill, or intended to kill. Jones', 741 F.2d at 812-13. No matter how this Court resolves the jury question issue presented in Bullock, Larry Jones case is unaffected. For that reason, the granting of certiorari in Bullock has no bearing on the question of whether to grant certiorari in this case.

REASONS FOR REFUSING TO GRANT THE WRIT

A. First question presented:

The writ should be granted to determine whether the United States Court of Appeals for the Fifth Circuit has misconstrued this Court's ruling in Enmund

Response

There is neither a substantial federal question involved, nor a conflict of the circuits raised by the Fifth Circuit holding that the death penalty cannot be imposed in absence of evidence that Larry Jones killed, intended to kill, or attempted to kill.

The central holding of the Fifth Circuit was that there was no evidence in the state court trial to support a finding that Larry Jones killed, intended to kill, or attempted to kill. Jones, 741 F.2d at 812-13. This holding concerns only the facts found in this individual record. The two legal propositions essential to the Fifth Circuit's holding--(1) that a state must prove a defendant to have killed, attempted to kill, or intended to kill to support a death sentence; and (2) that the double jeopardy clause bars a re-trial where there was insufficient evidence in a prior trial--have already been clearly and thoroughly expounded upon by the Court, in Enmund v. Florida, 458 U.S. 782, 801 (1981) and Burks v. United States, 437 U.S. 1, 18 (1978),

respectively. There are no decisions in the circuit or state courts that conflict with the Fifth Circuit's application of Enmund and Burks in Larry's case. Furthermore, the Attorney General concedes the correctness of the Fifth Circuit's construction of these cases. Attorney General's Petition at 42-43, 55-56.

The Attorney General attempts to create a legal issue by suggesting that the Fifth Circuit decided that Enmund prohibits the death penalty where one has been found to be "aiding and abetting in the homicide." Attorney General Petition at 24. This misstates the Fifth Circuit's holding; the Fifth Circuit found the death penalty could not be imposed in the absence of proof that Larry Jones aided or abetted in a homicide. This finding was based upon a record which, at most, might establish that Larry Jones aided and abetted in a robbery:

> ...Jones himself has not been shown to have killed or intended to kill. His presence at the scene supports no such inference.

Jones v. Thigpen, 741 F.2d 805, 812 n.8 (5th Cir. 1984).

The Fifth Circuit's conclusion that there was no evidence of individual culpability in the homicide is based on the court's examination of the facts in the state trial record. The circumstantial evidence adduced at trial would support an inference that Larry was in the store where the homicide occurred, as inferred from his being observed in the vicinity of the store with goods from the store. The record would further support an inference that Larry was present in the store when the killing took place, as inferred from minute spots of un-typable human blood found on boots he wore. But that is all the record will support, even allowing the Attorney General all favorable

facts and inferences. This the Mississippi Supreme Court held was sufficient under the felony-murder rule in force at that time to justify imposition of the death penalty. Jones v. State, 381 So. 2d 983, 996 (Miss. 1980) (stating there "is strong evidence that he was at least present when the fatal beating took place. The doubt concerning Jones' precise role in the homicide does not upset the jury's sentence of death under these circumstances.").

The Fifth Circuit concluded that this evidence could only support a finding of culpability for the robbery, and not the homicide. The Attorney General has continually attempted to gloss over this conclusion by treating as interchangeable the issues of Larry's culpability for the robbery and his culpability for homicide. Compare Attorney General's Petition at 5-8 (accurate statement of fact showing no culpability for the homicide) with Attorney General's Petition at 24, 27, 28-29, 37, 40 (erroneously stating Larry was culpable for the homicide).

Examination of a trial record and review of the Fifth Circuit's conclusion as to facts is precisely the sort of project with which this Court does not occupy its time. Even if this Court did undertake such a mundane task, it would find that the lower court's factual findings are thoroughly correct and in accordance with the principles of In re Winship, 397 U.S. 358 (1970) and Jackson v. Virginia, 443 U.S. 307 (1979). The Attorney General's "first question presented" requires first that this Court review the trial record and find--contrary to the record and contrary to the Fifth Circuit's holding--that Larry aided and abetted the homicide. Since Larry aided and abetted only in the robbery and not in the homicide, the "first question

presented"--that of whether Enmund allows execution of one who aids and abets a homicide--is inapposite to this case. The petition for writ of certiorari on this question should be denied.

B(1) Second Question Presented:

Alternatively, the writ should be granted to determine whether under the circumstances the Court of Appeals erred in concluding that Enmund should be applied retroactively.

Response:

The question of whether Enmund should apply retroactively poses no substantial federal question, involves no conflict in the circuit courts of appeals, and is admittedly frivolous on its merits.

B(2) The question actually briefed by Petitioner:

Alternatively, the writ should be granted to determine whether under the circumstances the court of appeals erred in concluding that Burks should be applied.

Response:

The question of whether Burks should be applied is limited essentially to this particular case and poses no substantial federal question nor involves a conflict in the circuit courts of appeals.

(1)

A decision establishing that certain punishment is cruel and unusual involves just the sort of fundamental guarantee that is not susceptible to solely prospective application. This is conditionally conceded by the Attorney General at page 55 of the Petition: "...we do not, in this alternate proposition, contest the retroactive application of Enmund." Attorney General's Petition at 55. The Attorney General then proceeds to suggest that because the Attorney General relied on the pre-Enmund common law rule, it would be unfair to retroactively apply the constitutional principle expressed in Enmund. The Fifth Circuit expressly

recognized "the patent frivolousness of such an argument." Jones, 741 F.2d at 811.

An unconditional concession that the rule is retroactive would have been more appropriate, as there appears to be a unanimity among the circuit courts of appeals which have faced Enmund questions. See, e.g., Hitchock v. Wainwright, 745 F.2d 1332, 1340 (11th Cir. 1984) (applying Enmund retroactively) (a 1976 killing); Jones v. Thigpen, 741 F.2d 805, 810-12 (5th Cir. 1984) (expressly declaring Enmund to be retroactively applied) (a 1974 killing); Chaney v. Brown, 730 F.2d 1334, 1350 (10th Cir. 1984) (applying Enmund retoractively) (a 1977 killing); Hutchins v. Garrison, 724 F.2d 1425, 1435 n.14 (4th Cir. 1983) (same) (a 1979 killing); Gentry v. MacDougall, 685 F.2d 322, 323 (9th Cir. 1982) (same) (a 1977 killing).

In view of the foregoing, this question poses neither a substantial federal question nor involves a conflict among circuit courts of appeal. The petition for writ of certiorari on this issue should thus be denied.

(2)

The Attorney General's discussion of its second question presented is almost entirely a discussion of the merits--whether it was "surprised" by Enmund and should get a third opportunity to offer Enmund proof. In facing this issue, the Attorney General concedes the correctness, as a general principle, of the Fifth Circuit's conjunction of the Enmund requirement of individual culpability and the Burks requirement of sufficient evidence before a retrial can be had. Attorney General's Petition at 44, 56. The Attorney General complains only that, because Larry's is an older case, tried in December of 1977, the State should have another opportunity to prove "intent to kill," unhampered by

double jeopardy bars because it was surprised by the Enmund requirement. Attorney General's Petition at 56-57.

The Attorney General fails to mention or argue "conflict in the circuits" or "substantial federal question" because this case is sui generis and presents no question of any importance that reaches beyond this individual case. The Fifth Circuit recognized this:

> We know of no other case in which an Enmund claim has succeeded on grounds of insufficient evidence, and we are led to believe that most of the few death sentences based on felony murder convictions are supported by Enmund evidence sufficient under the Jackson standard. The double jeopardy bar will be infrequent indeed.

741 F.2d at 812.

Basically, the Attorney General is asking this Court to formulate a way around the double jeopardy clause for this case alone. The Attorney General concedes that any such circumventing of the double jeopardy clause will be based on the specific facts relating to the alleged unanticipated nature of the Enmund decision. Attorney General Petition at 44-46. The focus on specific facts, necessary to evaluate this "surprise" issue, precludes the possibility of a clear, broad principle of law being generated.

Linam v. Griffin, 685 F.2d 369 (10th Cir. 1982), which the Attorney General seems to argue conflicts with the Fifth Circuit's Jones opinion does not involve the same question at all. Linam merely holds that where a rule is "merely a formal matter, not a substantive one [,]...there is no problem of whether to produce evidence." Linam, 685 at 373-74. Linam involved the procedure for proving the other crimes for a habitual offender conviction, not a

substantive element of proof the state had to prove to make its case. Linam, 685 F.2d at 371. No conflict exists among the circuit courts of appeal on the double jeopardy issue announced in Larry's case.

In avoiding discussion of conflicts in the circuits or presence of a substantial federal question, the Attorney General focuses instead on the merits of its argument that it was surprised by Enmund. Yet the Enmund requirement of individual culpability was foreseeable at the time of the trial. Even Larry Jones' then lawyer--since held ineffective by the District Court[2]--foresaw Enmund at trial and preserved it as have all of Larry Jones' subsequent lawyers. Enmund was, quite simply, no surprise at the time it was handed down. The Enmund rule had been clearly foreshadowed in cases before Coker, such as Roberts v. Louisiana, 428 U.S. 325, 353 (1976) ("...capital punishment is acceptable to the contemporary community as just punishment for at least some intentional killings" [emphasis added]), and the rule had been raised and preserved as an issue well-prior to Larry's 1977 trial, as evident in Richmond v. Cardwell, 450 F. Supp. 519, 524 (D. Ariz. 1978) (a 1973 killing where the Enmund issue had been raised and preserved, and was directly addressed by the court). Furthermore, as several courts have recognized, Enmund was insufficiently novel for its "newness" to count as "cause" under the cause-and-prejudice test of Engle v. Isaac, 456 U.S. 107 (1982). See, e.g., King v. Strickland, 714 F.2d 1481, 1491-92 (11th Cir. 1983) (newness of Enmund

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[2] Jones v. Thigpen, 555 F. Supp. 980, 879-80 (S.D. Miss. 1983). Jones' then attorney has since been disbarred. The District Attorney who tried the case is presently under federal indictment for racketeering.

insufficient to constitute "cause"); Griffin v. Wainright, 588 F. Supp. 1549, 1564 (M.D. Fla. 1984) (same); Evans v. State, 441 So. 2d 520, 523 (Miss. 1983) (same); Smith v. State, 434 So. 2d 212, 217 (Miss. 1983) ("tools" not lacking to form Enmund claim).

The Attorney General in other cases--Evans and Smith in particular--has persuasively argued that Enmund was so foreseeable for defense counsel that any novelty in its holding could not constitute "cause" to excuse procedural default. In the case at bar, the Attorney General claims that it did not foresee the Enmund rule. Any rule defense counsel should have foreseen would be equally predictable to prosecuting attorneys. There is no substance to the Attorney General's argument that it was "surprised" by Enmund.

C. Third Question Presented:

The Court should granted [sic] the writ to determine whether the Court of Appeals erred in failing to find that respondent's claims of ineffective assistance of counsel and failure to give a lesser included offense (instruction?) were procedurally barred.

RESPONSE:

(1) The question of whether a Mississippi Supreme Court's no-opinion order is predicated on procedural bar poses no substantial federal question, involves no conflcit in the circuit courts of appeal, and is admittedly raised only for preservation purposes.

(2) The merits of Larry's ineffective-assistance-of-counsel claim and his lesser-included-offense claim underscore the fact that Larry is entitled to vacation of both his death sentence and his conviction regardless of how the first two "questions presented" are decided.

(1)

The Attorney General explicitly declines to urge this question as a viable one before this Court, but rather has raised it only for preservation purposes. Attorney General's Petition at i, 58-59. If actually urged, this question would once again invite this Court to make a finding of fact contrary to the lower courts, regarding whether or not the Mississippi Supreme Court invokes state procedural bars through a no-opinion order denying access to collateral relief in state court to Larry. This raises no substantial federal question nor does it involve a conflict among the circuit courts of appeal.

CONCLUSION

This case is of no importance beyond the immediate parties. This case involves neither a substantial federal question nor a conflict among the circuit courts of appeals. Furthermore, the Attorney General's arguments on the merits raised in his petition are without merit.

Accordingly, the petition should be denied.

Respectfully submitted,

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APPENDIX

STATUTORY MATERIALS

Miss. Code Ann. § 99-19-101 (as amended 1983)

§ 99-19-101 Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and circumstances to be considered.

§ (7) In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:

(a) The defendant actually killed;

(b) The defendant attempted to kill;

(c) The defendant intended that a killing take place;

(d) The defendant contemplated that lethal force would be employed.

CERTIFICATE OF SERVICE

I, T.H. FREELAND, III, counsel of record for respondent, certify that I have this day caused to be mailed via the United States Postal Service, first class postage prepaid, a true and correct copy of the foregoing Brief in Opposition to the Petition for a Writ of Certiorari to the following:

William S. Boyd, III, Esquire
White & Morse
Suite 1209 - One Hancock Plaza
Gulfport, Mississippi 39502

This, the 17th day of May, 1985.

T.H. FREELAND, III